No. 92-215

Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1992

JOHN L. BROOKS, et al.,
Petitioners,
vs.
HILTON CASINOS, INC., et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Can a federal court deny the availability of a state cause of action without either certifying the question to the state Supreme Court or making an independent determination of state law?

2. When does a federal appellate court's review of the evidence at trial become so partial as to violate standards of appellate review and intrude upon the jury's function to judge disputed questions of fact?

3. Does a federal court violate the principles of *Erie*, when it grossly misreads state law?

4. Should a motion to recuse be granted when a judge has a public reputation of bias against the kind of claims at issue in a case?

LIST OF PARTIES

The parties to the proceedings below were the following 37 plaintiffs, all except Foltz are also petitioners in this proceeding: John L. Brooks, Frederick Amie, Norman V. Ballard, Jack A. Bosarge, Robert A. Dawson, Douglas S. Delling, Alan Kirk Drake, Roger H. Dudley, Donald A. Foltz, Robert W. Gasson, Harold Edward Gill, Delbert R. Grace, James L. Hineline, Valentin Jodra, Marko Kustudia, Josef Francis Landers, John P. McDonough, Jr., Robert G. Meranto, John Mikitaroff, Norman A. Mitchell, Jose A. Navarro, Edward C. Neill, Thomas H. Newman, III, Donald E. Penny, Anthony V. Pintaone, James L. Pollins, Warren Prewitt, Jr., Paul W. Rexroad, Victoriano Rodriguez, Joseph A. Saunto, Estate of James E. Shailer, Monte G. Stanford, Jay W. Sterling, Juan F. Torres, Keith L. Vanstrom, Vernon J. Williams, and Tony J. Zarro.

Also a party to the proceedings below, who is not a petitioner in this proceeding, was the Equal Employment Opportunity Commission as plaintiff in intervention. The EEOC still has an interest in the outcome of this petition.

Respondents to these proceedings before this Court who were also defendants in the proceedings below are Hilton Casino, Inc. d/b/a Las Vegas Hilton, a Nevada corporation and its parent corporation, Hilton Hotels Corporation, a California Corporation.

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The petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion entered in this case by the United States Court of Appeals for the Ninth Circuit on March 12, 1992.

OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at __ F.2d __ , (March 12, 1992) and is reprinted in the appendix hereto, p. A-2, infra.

JURISDICTION

Petitioners filed this action in the United States District Court, Southern District of Nevada. On March 10, 1989, a jury returned 177 verdicts in favor of 36 petitioners. On February 1, 1990, the District Court entered judgment, awarding petitioners approximately $45,000,000.

On March 12, 1992, the Ninth Circuit substantially reversed the District Court. Petitioners filed a timely Petition for Rehear-

ing and Suggestion for Rehearing en banc, both of which were denied on May 1, 1992.

This Court has jurisdiction to review the judgment of the Court of Appeals under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

28 U.S.C. § 455 Interest of justice or judge

STATEMENT OF THE CASE

On Labor Day weekend of 1983, the Las Vegas Hilton fired 37 of the 200 employees who worked in its blackjack pit. They had no notice or warning; they were simply fired as they came off their shifts. They were all given the same reason: "Change in personnel." No further explanation was offered. Six years later, after trial in federal court, the real reason became clear. They were fired as part of an effort to divert attention from suspected embezzlement by members of Hilton's management. Instead of identifying the real wrongdoers, Hilton sought to cast suspicion upon the petitioners.

These men have been described as among the best floormen and dealers of 21, roulette, and Big Six in the State of Nevada and possibly the world. They had the longest employment service with Hilton of any casino employees (from 11 to 17 years). They had all been with the Las Vegas Hilton since the day it opened. They were replaced immediately by new dealers, mostly women, at entry level wages with no fringe benefits, who on average were 15 years younger than petitioners.

On March 10, 1989, after three and one half months of trial, the testimony of approximately 70 witnesses and presentation of hundreds of exhibits, a federal jury in Las Vegas returned 177 separate verdicts for all the plaintiffs. They were awarded some $38.8 million ($1,600,000 in total lost back pay, employee benefits and other economic losses, $7,200,000 in general damages for emotional distress and $30,000,000 in punitive damages). Petitioners were successful on their federal causes of action — under the Federal Age Discrimination In Employment Act of 1967,

29 U.S.C. § 621-634, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5-(f) — as well as on their pendent state causes of action.

The jury found the mass firing of plaintiffs to be an act of age discrimination in violation of federal law; the trial court also found sex discrimination. Most of the damages awarded, however, were based on the state-law claims. On the basis of voluminous evidence of Hilton management's admissions and repeated assurances to petitioners that their jobs were secure as long as they continued to perform adequately, the jury found that petitioners were not at-will employees. Rather, each had a contractual relationship with Hilton, which the jury found to be breached by Hilton's bad-faith discharge of petitioners.

More disturbingly, the jury also found that Hilton's management had used the dismissals as a cover-up for an embezzlement scam by management that was costing Hilton millions of dollars. In order to escape public discovery of the real problem at the casino, Hilton diverted suspicion to these innocent former employees. Hilton's management made it appear that petitioners were responsible for the losses.

Management succeeded, until the verdict, in making plaintiffs suffer the personal and financial consequences of this ruthless solution to its predicament. The verdict established that management knew that the mass firing would raise suspicions that would hang over plaintiffs and damage or destroy their careers in the gambling industry. That is exactly what happened.

The gambling industry of Nevada and Hilton together reacted to the verdict first with rage, then contempt and finally, threats. Calling the verdict "stupid" they charged that the legal system is "completely out of whack" and "has to be controlled." "The laws have to be changed and that's a top priority of ours", they announced to the press. (See press article, Las Vegas Review Journal, March 10, 1989, Appendix p. A-56, Excerpt of Record, Vol. III, No. 550) The gambling industry descended on the state legislature, which responded by imposing a cap on punitive damages. The industry also sought to make the cap retroactive and thus applicable to these verdicts. This exercise of brazen

political muscle failed. The legislature refused to take from petitioners that which a jury had awarded.

During the eleven months following the verdict, respondents made continuous attacks on the verdicts before the trial court. In the end, the trial judge upheld the verdicts in their entirety and entered judgment including prejudgment interest, taxable litigation costs and attorneys' fees for a total of approximately $45,000,000.

During the course of the appeal, the gambling industry intensified its attack on the legal concepts establishing a right to recovery of damages by unfairly discharged employees. As amicus curiae, it entered almost every employment case in the state. It sought to obtain from the Nevada Supreme Court what it had failed to obtain from the State Legislature. Nevertheless, the Nevada Supreme Court retained the contract and tort rights for employees on which the judgments in this case were based. See point III, infra.

On March 12, 1992, the Ninth Circuit Court of Appeals, in a 2 to 1 decision written by Judge Alex Kozinski, took away *all* plaintiffs' judgment for damages under state law and entered judgment for Hilton as a *matter of law*. What respondents had been unable to obtain from either the Nevada Legislature or the State Supreme Court, they obtained from the federal appellate court. To reach this result, the majority had to misrepresent state law, ignore evidence favorable to petitioners, deny appellate review to most of the individual petitioners, and displace the jury function of weighing the evidence. Effectively, the appellate decision denied petitioners their right to have a jury decide their claims. This abuse of the appellate process was so extreme as to amount to a denial of due process. See *Lindsey v. Normet*, 405 U.S. 76 (1972).

In addition to raising issues of appellate process, this unprecedented intrusion of a federal court into the appropriate domain of state law raises serious federalism concerns. This Court has repeatedly upheld the right of state courts and legislatures to determine the state's own destiny. Often, this concern for federalism arises in cases of compelling public interest. In just the last

term, for example, the Court has expressed its concern for federalism in cases involving access to abortion, *Planned Parenthood v. Casey*, 60 U.S.L.W. 4795 (June 29, 1992); capital punishment, (*Vasquez v. Harris*, Order April 21, 1992 vacating Ninth Circuit Court of Appeals stay of execution) and state taxation of property, *Nordlinger v. Hahn*, 60 U.S.L.W. 4563 (June 18, 1992). State-created rights of employment and freedom from duress are every bit as essential to our federalism as are controversies over abortion and criminal penalties. Indeed, they are far more important to the average citizen. The action of individual states regarding the at-will doctrine and tort law in the employment relationship affects 100,000,000 nonunion employees, over 80% of all working Americans. It is the most significant development in employment law since the advent of unions over a century ago. This Court should therefore correct the misapplication of law by the Court of Appeals and give back to petitioners the rights the state refused to take away from them.

Reasons for Granting the Writ

I.

The Failure of the Court of Appeals Either to Make an Effort to Determine State Law or to Certify a Question of State Law Denied Petitioners Their Right under *Erie* to Federal Court Adjudication of Their Tort Claim

At trial, petitioners were successful on their federal claims of discrimination as well as their state-law contract and tort claims. Respondents, however, chose not to appeal the judgment under the federal causes of action. Thus, only the damage awards on the state-law causes of action came before the Court of Appeals. The Court of Appeals reversed the judgment awarding petitioners damages for intentional infliction of emotional distress, because, in its view, the availability of this cause of action in the employment context had not yet been clearly articulated by the State Supreme Court.

When a federal appellate court has before it a state-law claim, it is no longer the case that judicial restraint necessarily signifies respect for state control of the creation and execution of its own

law. That may be true before trial — the federal courts may prefer that state-law claims be litigated in the state courts — but once jurisdiction is accepted, respect for federalism requires adherence to the content of state law, and not a reluctance to apply state law. Thus, the decision of the Court of Appeals, while seeming to remove the federal courts from an area of primary state responsibility, in fact, violated fundamental principles of federalism.

That a federal court executing state law must do its best to determine the actual content of that law is nothing more than a restatement of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). "In decisions after *Erie*, this Court made clear that state law is to be determined in the same manner as a federal court resolves an evolving issue of federal law: 'with the aid of such light as [is] afforded by the materials for decision at hand, and in accordance with the applicable principles for determining state law.' " *Meredith v. Winter Haven*, 320 U.S. 228 (1943) This principle was reaffirmed recently in *Salve Regina College v. Russell*, 111 S.Ct. 1217, 12180-19 (1991).

In place of the well-established principles of *Erie*, the Court of Appeals substituted a new doctrine of judgment by default. When state law is less than explicit, Judge Kozinski suggests, a federal court should simply decline to make any determination at all:

> Since the Nevada Supreme Court has given no indication that the emotional distress cause of action applies in the employment termination context, and the issue is open elsewhere, the District Court erred in instructing the jury on this cause of action.

Op. p. 2492. The majority, thereby, declined even to approach the question of how the Nevada Supreme Court would rule on this issue. It did not simply send petitioners to the state courts; rather, it threw them out of court altogether. It ruled against them substantively, as a matter of state law, without bothering to determine what that law actually is.

In so doing, the Court of Appeals summarily reversed the District Court's declaration of state law. The District Court, which sits in Nevada, is, of course, more familiar with that state's law. On the basis of a survey of case law that court had been

"persuaded that Nevada courts would recognize that accusations or implications of employee dishonesty or misconduct may amount to intentional infliction of emotional distress." (Appendix p. A-54, Memorandum Opinion, pg. 5) Indeed, two other federal district courts sitting in Nevada have also recognized a state-law cause of action for intentional infliction claims in the employment context. See *Wolber v. Service Corp. Int'l.*, 612 F.Supp. 235 (D. Nev. 1985) (rejecting challenge of workers' compensation exclusivity); *Norman v. General Motors Corp.*, I IER cases, 1221, 1222 (D. Nev. 1986) (recognizing "abuse of a position of power" as sufficiently outrageous conduct to support that claim in the employment context.)[1] The Court of Appeals considered none of these district court judgments, adhering to the position that in the absence of an explicit statement from the state Supreme Court, a federal court may not contemplate the cause of action.

State law, however, is often not as clear as the Court of Appeals would require. If the federal courts were truly to follow this rule, they would close off this judicial forum to a wide variety of state-law claims, for which jurisdiction has been provided both by the Constitution and by statute. The Ninth Circuit itself had previously articulated the proper standard of review of a state-law claim:

> When interpreting state law, the federal court is bound by the decision of the state's highest court; moreover, in the absence of such decision, the federal court must predict how the highest state court would decide the issue using intermediate appellate court decisions, decisions from other jurisdictions, statutes, and treatises and restatements as guidance,

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[1]Other states also recognize the same tort in the employment context, e.g., *Rulon-Miller v. International Business Machs. Corp.*, 162 Cal.App.3d 241, 208 Cal.Rptr. 524 (1984); *Agarwal v. Johnson*, 25 Cal.3d 932, 947, 160 Cal.Rptr. 141, 150, 603 P.2d 58, 66-67 (1979); *Salazar v. Furr's, Inc.*, 629 F.Supp. 1403, 1411 (D. N.M. 1986); *Armano v. Federal Reserve Bank of Boston*, 468 F.Supp. 674 (D. Mass. 1979); *Hall v. May Dept. Stores Co.*, 292 Or. 131, 637 P.2d 131 (1981); *Counce v. M.B.M. Co., Inc.*, 597 S.W.2d 92 (Ark. Ct. App.) (1979); *Agis v. Howard Johnson*, 371 Mass. 140, 355 N.E.2d 315 (Mass. 1976); *Beavers v. Johnston*, 112 Ga.App. 677, 145 S.E.2d 776 (1965).

> and is bound to follow the decisions of the state's intermediate court in the absence of convincing evidence that the highest court would differ.

In re Kirkland, 915 F.2d 1236 (1990)

Not only does inaction in this context violate the well-established *Erie* principle of respect for state law, but it also conflicts with the principle recently articulated in *Salve Regina College v. Russell*, 111 S.Ct. 1217 (1991). The Court of appeals decision below presents just the opposite situation from that considered in *Salve Regina College*. There the Court of Appeals inappropriately deferred to the state-law judgment of the District Court. Here the Court of Appeals failed to provide meaningful review of the District Court holding because it failed to review it at all.[2] In both situations, the Court of Appeals has failed in its responsibilities: "Independent appellate review necessarily entails a careful consideration of the District Court's legal analysis, and an efficient and sensitive appellate court at least will naturally consider this analysis in undertaking its review." Id. at 1221. No such review was afforded in this case.

The Court of Appeals' failure to accord the required respect to state law is compounded in this case by its failure to make use of an available certification procedure. The Nevada Supreme Court has indicated its willingness to respond to verified questions from

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[2]See the analysis in the Memorandum Decision Denying Motion for Summary Judgment (Appendix p. A-52), entered on November 19, 1987, before full discovery of the scam perpetrated by Hilton's management and Hilton's effort to divert suspicion to petitioners. Nevertheless, even without the benefit of such evidence, District Court Judge Lloyd D. George found, in denying Hilton's motion to strike the tort of intentional infliction, that under Nevada law, "... however ostensibly businesslike the individual termination interviews were, an issue of fact remains as to whether, taken together, all of the circumstances amounted to a course of conduct exceeding bounds tolerated by a decent society." (Appendix, p. A-55) Excerpt of Record, Vol. I CR 107

The trial judge, with 40 years experience on the federal bench in Nevada, came to the same conclusions in denying respondent's motions for directed verdict and post-trial motions.

the federal Court of Appeals. See *Joseph F. Sanson Inv. Co. v. 268 Ltd.*, 795 P.2d 493, 497 (Nev. 1990) (per curiam). Certification of the question of a cause of action for intentional infliction of emotional distress was, in fact, requested by both parties[3] as well as the dissenting judge. See App. Op. p. 2517.

This Court has held that certification "rests in the sound discretion of the federal court." *Salve Regina College*, 111 S.Ct at 1217, 1224, fn. 4 (1991). But this Court also took it for granted that that discretion would be exercised when needed to resolve an important question of state law: "Of course, a question of state law usually can be resolved definitively . . . if a certification procedure is available and is successfully utilized." Id. In this case, when there was a disagreement with the trial court — as well as with other federal district courts sitting in Nevada — when the law in this area is rapidly developing, and when petitioners had obtained vindication and recovery of millions of dollars on the basis of this state-law claim, the failure to utilize the certification procedure amounted to an abuse of discretion. Chief Justice Rehnquist wrote a number of years ago that "If a [lower] court believes that it can resolve an issue of state law with available research materials already at hand, and makes the effort to do so, its determination should not be disturbed simply because the certification procedure existed but was not used." *Lehman Brothers v. Schein*, 416 U.S. 386, 395 (1974) (Rehnquist, J. concurring). Here, the Court of Appeals completely failed to "make the effort." Its decision not to certify, therefore, amounted to an abuse of discretion.

Minimally, this Court should vacate the judgment below with instructions that the Court of Appeals certify the issues of state law to the Nevada Supreme Court.

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[3]Petitioners requested certification in the Petition for Rehearing, p. 12; respondents requested certification in their brief to the Court of Appeals, p. 40.

II.

The Failure of the Court of Appeals to Follow Appropriate Standards of Appellate Review Effectively Denied Petitioners Any Review of the Case They Presented to the Jury

A federal court of appeals has plenary authority to review a final decision of a district court. 28 U.S.C. § 1291. Review, however, extends to the decision that was made, not to some other decision that might have been made. In this case, the Court of Appeals ignored both the form and the substance of the district court's judgments. The result was that the judgments in favor of petitioners were reversed without ever being recognized.

Formally, 177 separate verdicts were entered. Each petitioner was separately successful on both a breach of contract claim and a claim of intentional infliction of emotional distress. The trial court did not instruct the jury that they must or even may consider all similar claims as a group. Instead, it instructed the jury that "Each award of plaintiff must be separate. Except as to punitive damages you may not make an overall award for the plaintiffs as a group." (RT L-66).

The Court of Appeals was not similarly concerned with the rights of each individual. In fact, the majority gave only eleven carefully chosen petitioners any appellate review whatsoever. Even with respect to them, "The majority . . . presents selective portions of the plaintiffs' evidence to question the jury's determination that an implied contract existed . . . Yet the majority fails to include testimony by the very same plaintiffs tending to diminish or place into context the impact of the selected excerpts." Appendix, Judge Boochever, dissenting at 2505. This casual attitude toward the petitioners as individuals meant that the court ignored differences in the evidence. Yet it reversed all of the judgments wholesale. Judge Boochever's dissent points out numerous instances in which the majority simply ignored evidence that supported the claims of individual petitioners. See Appendix, id. at 2503-13.

Substantively, the Court of Appeals gave little attention to the case that was actually presented to the jury and upon which the jury ruled affirmatively. The court misconstrued the critical ele-

ments of the factual case that supported both the tort and the contract claims.

Petitioners demonstrated at trial that respondents had engaged in an outrageous course of conduct, over a course of several years, designed to suggest that petitioners had been fired for theft. Hilton deliberately conveyed the message, from about 1984 until the jury verdict in 1989, that petitioners were responsible for huge losses — all the time knowing that the problems at the Hilton operations had nothing to do with petitioners. It was *not* the discharge of petitioners itself that constituted the tort of intentional infliction. Hilton charged that petitioners were fired for misconduct a full year after the mass firing. The discharge was only a step on the way to further tortious conduct which occurred *after* the discharge.

Hilton's subsequent tortious conduct, therefore, was quite independent of the firing. Nevertheless, the Court of Appeals reversed the judgments in favor of petitioners' tort claims on the grounds that the discharge was lawful:

> Because plaintiffs were at-will employees, Hilton was entitled to terminate them without cause. Hence, their *discharge* did not amount to the type of willful misconduct that could serve as a predicate for the tort of intentional infliction of emotional distress . . .

App. Op. at 2491 (emphasis added). At this point, the Court of Appeals is simply not reviewing the entire case, including post termination evidence that was presented to the jury and which by itself would support the verdicts and judgment.

The court wholly ignored all evidence of Hilton's tortious conduct after the termination. Thus, it reversed the jury verdicts, without ever considering an important basis for those verdicts. For petitioners, appellate review amounted to no review at all. This was a clear abuse of the appellate process, which this Court should correct.

The Court of Appeals treated petitioners' contract claims with an equal indifference to the case presented to the jury. For example, the court wholly ignored the undisputed admission from

Hilton's own CEO and Chairman of the Board that the employer itself, at the time petitioners were hired, understood and agreed that the relationship was *not* one in which the employees could be fired without a "just and fair reason." RT IX 100, 109 (Brief of Appellees/Cross-Appellants, p. 23) This admission, standing by itself, could support the jury's conclusion that petitioners were not at-will employees.

A substantial part of the evidence presented to the jury supported petitioners' alternate claim that the parties had modified their contracts of employment through conduct after they were hired. Over a period of time, Hilton's management had made a variety of express and implied promises of job security. Again, the court simply ignored this basis for the jury's conclusion, holding that "because no reasonable jury could have found an agreement at that time [when Hilton became the employer], the later expressions by management are irrelevant to the issue before us." Appendix, Op. at 2489 n. 5.

The majority justify this claim by asserting that "plaintiffs theory in this case was that they were covered by an implied contract *from the date they were hired.*" Id. While ignoring strong undisputed evidence supporting that theory, the majority wholly ignores the reality that petitioners argued in the alternative and even submitted jury instructions on the issue of subsequent modification of the contracts.

When the court did consider the evidence actually presented in the case, its consideration was so partial as to amount to an impermissible invasion of the fact-finding function of the jury. The majority ignored or rejected all of petitioners' evidence including, but not limited to:

(1) longevity of satisfactory employment;

(2) a written handbook setting forth rules for discipline and termination;

(3) Hilton's long-standing practice of giving written warning before termination;

(4) numerous statements by management that petitioners would have their jobs, so long as they performed satisfactorily;

(5) specific promises that "there will be no more terminations";

(6) assurances of job security given in the face of union organizing efforts;

(7) statements that petitioners were part of the "Hilton family";

(8) inducements extended by Hilton to retain petitioners.

All of this amounted to nothing more than "stray statements" according to the majority. Op. 2489. That, however, is a judgment that a Court of Appeals is not competent to make. In its reevaluation of this evidence — all of which was relevant to the contract claim — the Court of Appeals improperly displaced the jury's function, the "very essence of [which] is to select from among conflicting inferences and conclusions that which it considers most reasonable." *Schultz v. Pennsylvania R.R. Co.*, 350 U.S. 523, 526 (1956) (quoting *Tennant v. Peoria & P.U. Ry. Co.*, 321 U.S. 29, 35 (1944)).

While this Court has held that "It is not the function of the reviewing court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences", *Schultz*, 350 U.S. at 526, n. 8, the Court of Appeals did just that. Thus, it held that petitioners' case could not, as a matter of law, succeed before the jury because it was "based on common employment policies that are compatible with either at-will or dismissal-for-cause-only employment." Appendix, Op. at 2478. This Court has admonished that if the evidence can be interpreted either way, it is not the function of the Court of Appeals to substitute its judgment for that of the jury.

In ignoring evidence favorable to petitioners' judgments, rejecting permissible inferences in petitioners' favor, and reweighing conflicting evidence, the Court of Appeals violated established rules of appellate procedure, denied petitioners a fair hearing on

appellate review, and usurped the functions of the jury. This abuse of the appellate process was so extreme as to amount to a denial of due process.

III.

The Court of Appeals Errors of State Law Were So Extreme as to Amount to an Abuse of the Appellate Process

The Court of Appeals' abuse of the appellate process extended beyond its review — or failure to review — the actual case as it had been developed at trial. The court also made critical mistakes in its understanding of state law with respect to both the tort and the contract claims.

On the tort claim, the court relied upon *Alford v. Harold's Club*, 669 P.2d 721, 724 (Nev. 1983) (per curiam), for the proposition that if an employer has a legal right to terminate an employee, then the termination can never support a claim of intentional infliction of emotional distress.[4] But *Alford* was itself based on a line of authorities, including the Restatement 2d Torts, that make clear that a lawful act — e.g., termination — is nothing more than an affirmative defense to an action in tort.[5] That defense may be overcome by a showing of malice. See Restatement 2d Torts, Section 46, Comment (g). In this case, the jury answered in favor of petitioners a special interrogatory concerning malice. (Special Interrogatory No. V). In short, the Court of Appeals relied upon both the wrong facts and the wrong law in reversing the judgments awarding petitioners millions of dollars in damages for Hilton's intentional infliction of emotional distress.

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[4]The majority has again violated its responsibilities under *Erie* and *In re Kirkland*, supra, by refusing, without the required analysis, to acknowledge that federal district courts sitting in Nevada have recognized the tort of intentional infliction in the employment (at will) context, supra, p. 7, 8.

[5]See e.g. *Star v. Rabello*, 625 P.2d 90 (Nev. 1981); *Branda v. Sanford*, 637 P.2d 1223 (Nev. 1981), which cite *Cervantes v. J. C. Penney Co., Inc.*, 595 P.2d 975 (Cal. 1979).

The critical error in the Court of Appeals' analysis of the contract claim was its rejection of a "totality of the circumstances" approach, stating:

> the confluence of several factors, none of which by itself [is] sufficient to establish the existence of an employment contract, can[not] establish such a contract when aggregated. . . . Individual factors that do not, as a matter of law, establish such a meeting of minds [between the contracting parties] cannot, by some peculiar alchemy, create a legally binding relationship when combined with each other.

Appendix, Opinion at 2479 n. 3. Nevada law, however, is exactly to the contrary. The "totality of the circumstances" surrounding the employment relationship must be considered in determining the existence and terms of an employment relationship.

In *Stone v. Mission Bay Mortgage Co.*, 672 P.2d 629 (Nev. 1983), the Nevada Supreme Court held that all objective evidence of an agreement that plaintiff would be terminated only for just cause is relevant to the question of the existence and terms of an implied contract. That Court has repeatedly held that the issue is one of fact to be determined by the jury on the basis of *all* of the evidence. See e.g. *Beales v. Hillhaven, Inc.*, 825 P.2d 212 (Nev. 1992); *D'Angelo v. Gardner*, 819 P.2d 206 (Nev. 1991).

The court below confused a number of instances in which the Nevada Court held that, under the particular facts of a particular case, an employee's claims were insufficient as a matter of law to give rise to a contractual relationship, with the general claim that whole categories of evidence were irrelevant as a matter of law to making this factual determination.[6] Judge Boochever in dissent, accurately set forth the state law: "[A]ll the evidence presented by the plaintiffs, taken as a whole, was properly considered by the jury because the *collective* evidence raised a question of fact

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[6]See *Bally's Grand Emp. Fed. Credit Union v. Wallen*, 779 P.2d 956 (Nev. 1989); *Vancheri v. GNLV Corp.*, 777 P.2d 366 (Nev. 1989); *Sands Regent v. Valgaardsen*, 777 P.2d 898 (Nev. 1989); and *Smith v. Cladionos*, 752 P.2d 233 (Nev. 1988).

whether the at-will presumption had been rebutted, even if some of the evidence, considered *in isolation*, would have been insufficient." Appendix, Opinion at 2500.

While this Court does not ordinarily grant certiorari to correct errors of state law, the cumulative errors of appellate review were, in this case, extraordinary. The effect of the Court of Appeals misconstrual of state law on overcoming the at-will presumption was to deny petitioners' their right to a jury trial. It was to hold that the contracts that the jury found to exist and to have been willfully breached in bad faith were nonexistent as a matter of law. The decision below effectively put respondents' outrageous abuse of its relationship with petitioners beyond the reach of law. There is, however, absolutely no indication in state decisions that such conduct is to be protected.

IV.

Judge Kozinski's Failure to Recuse Himself Denied Petitioners Their Right to a Neutral Panel

Adding to the extraordinary abuse of the appellate process in this case, was a failure of Judge Kozinski to grant petitioners' recusal motion. Petitioners' fears turned out, in the end, to be well founded.

Ninth Circuit rules required a random selection from among the 38 active and senior judges available to hear this appeal. (Rule A(5) Selection of Panels, Court Structure and Procedures) The Court holds hearings at three locations simultaneously: San Francisco, Pasadena and Seattle. Originally the case was assigned to Pasadena to a panel including Judge Kozinski. However, an emergency motion for continuance by another party was granted and the Court declared that "This panel will not retain jurisdiction." When the Court reset oral argument approxi-

mately two months later, the case was again set for Pasadena and again Judge Kozinski was on the panel.[7]

The California Lawyer, the official publication of the State Bar of California, had just published a cover article about Judge Kozinski. See Appendix, p. A-64. A main focus of this article was the judge's apparent long-standing anti-employee bias. All living petitioners signed affidavits, based on information in the article, in which each questioned Judge Kozinski's "impartiality in a case such as ours." Each expressed concern that "I will not receive a fair hearing before Judge Kozinski." Appendix, p. A-72.

Congress has mandated that the federal courts maintain a strict standard of impartiality that assures all litigants that not even the appearance of partiality will infect the judicial process. Thus, "any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned . . ." 28 U.S.C. § 455. Judge Kozinski's impartiality toward petitioners' claims could "reasonably be questioned."

In 1980, then Judge Kennedy wrote:

> While bias or prejudice may spring from many sources, often extra-judicial in origin . . . [it] will disqualify only if it displays an attitude or state of mind that belies an aversion or hostility of a kind or degree that a fair minded person could not entirely set aside when judging certain persons or causes.

United States v. Conforte, 624 F.2d 869, 881 (CA 9). Judge Kozinski, however fair-minded he may be in other matters, does not pass Justice Kennedy's test with respect to claims of discharged employees such as petitioners. This Court should exercise its supervisory powers and vacate the judgment with

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[7]The odds against a case being reassigned to the same city and the same judge, when both are based on random selection, are seven out of 10,000. Before filing the Motion to Recuse, petitioners' concerns were brought to the attention of Chief Judge Wallace by letter. The clerk's reply (see Appendix) alleges that the assignment to two separate panels was at random. No mention, however, is made as to how the case was assigned again to Pasadena, instead of San Francisco or Seattle.

instructions that the Court of Appeals randomly select a new panel that does not contain Judge Kozinski.

Conclusion

Here the majority has stripped petitioners of their verdicts and appellate rights in a mass reversal reminiscent of their mass firing by Hilton.

The abuse of the appellate process was so clear in this case that it would be appropriate for this Court summarily to vacate the decision of the Court of Appeals, and remand with instructions that that court consider certification to the Nevada Supreme Court of all relevant unsettled issues of state law. Failing that, petitioners respectfully request that a writ of certiorari issue and the case be set for full briefing and argument.

Respectfully submitted,

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July 29, 1992

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN L. BROOKS, et al.,
Plaintiff-Appellant,

v.

HILTON CASINOS INCORPORATED, et al.,
Defendant-Appellee.

No. 90-15424

D.C. No.
CV-84-0436-RDF

JOHN L. BROOKS,
Plaintiff-Appellee,

v.

HILTON CASINOS INCORPORATED, d/b/a Las Vegas Hilton, a Nevada Corporation, et al.,
Defendant-Appellant.

No. 90-15460

JOHN L. BROOKS, Frederick Amie, Norman V. Ballard, Jack A. Bosarge, Robert A. Dawson, Douglas S. Delling, Alan Kirk Drake, Roger H. Dudley, et al.,
Plaintiffs,

and

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Intervenor-Appellant,

v.

HILTON CASINOS INCORPORATED, d/b/a Las Vegas Hilton, a Nevada Corporation; Hilton Hotel Corporation,
Defendant-Appellee.

No. 90-15623
OPINION

Appeal from the United States District Court
for the District of Nevada
Roger D. Foley, Senior District Judge, Presiding

Argued and Submitted
April 2, 1991—Pasadena, California

Filed March 12, 1992

Before: Robert Boochever, Alex Kozinski and Diarmuid F. O'Scannlain, Circuit Judges.

Opinion by Judge Kozinski; Partial Concurrence, Partial Dissent by Judge Boochever

SUMMARY

Contracts/Torts

The court of appeals affirmed in part and reversed in part judgments of the district court, remanding for further proceedings. The court held that evidence of employee expectations, based simply on common employment policies compatible with both at-will and for-cause employment contracts, was not sufficient grounds for permitting a jury to consider whether an employer had breached employment contracts and acted in bad faith in discharging those employees.

Plaintiffs, 37 dealers at a Las Vegas casino operated by defendant Hilton Casinos Inc., were terminated from their jobs. They sued and obtained favorable jury verdicts based on numerous state and federal law claims, including breach of contract, bad faith discharge, intentional infliction of emotional distress, and violation of the Age Discrimination in Employment Act.

[1] The district court erred in permitting the jury to consider whether the employees were covered by an implied contract because the plaintiffs were at-will employees as a matter of Nevada law. [2] The Nevada Supreme Court has rejected claims of contractual employment based on very similar evidence. That court held that general expressions of long term employment and a progressive employee disciplinary system were insufficient to rebut the state's presumption of at-will employment. [3] As in those Nevada cases, the plaintiffs here only offered evidence of their unilateral expectations, based on common employment policies that are compatible with both at-will and for-cause employment. [4] The only factor which the court properly could consider was whether Hilton management agreed to terminate only for failure to perform satisfactorily. The evidence on that issue was insufficient to establish such an agreement, and it was, therefore, error for the jury to consider the question.

[5] The plaintiffs relied on the fact that a pit boss testified that the employees were part of the "Hilton family" and would be terminated only if they did not perform satisfactorily. [6] A generalized understanding of job security based on satisfactory performance cannot create an implied contract of employment. [7] The Nevada Supreme Court has held that an employee's expectation of working as long as he wants is probative of an at-will relationship. [8] Further, the evidence indicates that a fair number of the plaintiffs were told nothing at all by the employer as to how long they could expect to work. [9] And some of the plaintiffs expressly acknowledged the at-will nature of their employment. [10] The evidence was overwhelming that Hilton was silent on the grounds for termination. The employees' subjective expectations cannot transform employment at will into a for-cause relationship. As a matter of Nevada law, the plaintiffs could be dismissed at will. [11] It was error to allow the jury to consider the implied contract issue.

[12] The plaintiffs could not recover in tort. A bad faith discharge tort cannot be committed against an at-will employee. [13] Further, their discharge could not serve as the predicate for the tort of intentional infliction of emotional distress, because it did not amount to willful misconduct, and because [14] Nevada law does not recognize a cause of action for that tort in the employment termination context. [15] Nor was there support for a punitive damages award.

[16] The Equal Employment Opportunity Commission argued that the plaintiffs should have been awarded liquidated damages in addition to back pay and the district court erred in refusing to allow the jury to award front pay. These issues are easily resolved on the basis of concessions made by Hilton and EEOC. [17] Liquidated damages should be awarded. The ADEA plaintiffs' back pay award should be doubled. [18] The district court did not abuse its discretion in declining to award front pay.

[19] One plaintiff challenged sanctions imposed by the district court for his refusal to provide information regarding his income, taxes, and employment. [20] That employee did not have a fifth amendment privilege concerning the requested information and records. [21] However, the sanctions imposed were excessive.

Judge Boochever wrote a separate opinion, concurring and dissenting. He stated he believed that the totality of the facts supported a triable issue as to whether there was an at-will employment contract, and he argued that the majority misconstrued Nevada law. He also contended that the majority's interpretation of Nevada law effectively eroded the factfinding function of the jury.

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OPINION

KOZINSKI, Circuit Judge:

Plaintiffs, 37 dealers at Hilton's Las Vegas casino, were terminated as they came off their shifts on September 2 and

3, 1983. They sued and obtained jury verdicts on several state and federal law claims. Hilton challenges plaintiffs' recovery on a variety of grounds, but because of the way we resolve the state law issues we need not discuss the difficult federal and constitutional issues raised by Hilton in its appeal.

I. *Breach of Contract and Bad Faith Discharge*

[1] Hilton challenges the damages awarded for breach of contract and bad faith discharge on the ground that plaintiffs were employed at will. We review the district court's determination of state law de novo. *Salve Regina College* v *Russell*, 111 S Ct 1217 (1991). By allowing the jury to consider whether these employees were covered by an implied contract, the district court implicitly held that the jury could reasonably have found such a contract. This was error. The damages award cannot stand because plaintiffs were at-will employees as a matter of Nevada law; the jury should never have been presented with the issue. Cf. *Smoot* v *Boise Cascade Corp.*, 942 F2d 1408 (9th Cir 1991) (finding error under Washington law of district court's submitting similar claim to jury).

Plaintiffs were not employed under a written employment contract. Under Nevada law, the absence of a written contract gives rise to the presumption that employment is at will. *See Vancheri* v *GNLV Corp.*, 777 P2d 366, 368 (Nev 1989) (per curiam). Plaintiffs had the burden of rebutting this presumption by establishing that they were employed under a contract terminable only for just cause. Plaintiffs' evidence fell into four broad categories: (1) plaintiffs' longstanding satisfactory employment with Hilton; (2) inducements extended by Hilton to retain plaintiffs, including employee benefits and a retirement plan that were among the best in the industry; (3) a progressive disciplinary system, and a past practice of terminating employees only in accordance with this system; and (4) assurances and representations by Hilton's management that plaintiffs were part of the "Hilton family" and

would have their jobs as long as they performed them satisfactorily.

[2] The Nevada Supreme Court has rejected claims of contractual employment based on very similar evidence. In *Vancheri*, the plaintiff was not employed under a written contract, but was told by management when he came to work that "he would have a long and successful association with the GNLV family." 777 P2d at 367. GNLV had also established a progressive discipline system. The court rejected Vancheri's argument that these circumstances could rebut the at-will presumption. As to the first factor, it said:

> Vancheri was never told that his employment would be terminated only for cause or that he would have employment for life or a specified period of time. General expressions of long term employment or job advancement do not convert an at-will employment contract to a termination only for cause contract.

Id at 369. As to the second factor, it said:

> Standardized disciplinary procedures are generally positive additions to a business. They provide employers a method of cautioning employees, and afford employees an opportunity to improve job performance in order to retain employment. They also create a general consistency and security in the work place. If we were to hold that the establishment of standard disciplinary procedures for employees is, in and of itself, sufficient to convert an at-will employee to an employee who can be fired only for cause, employers would be reluctant to continue to establish them.

Id at 369-70. The court concluded that these two circumstances were, as a matter of law, insufficient to rebut the presumption of at-will employment. Id at 370.

In *Bally's Grand Employees' Federal Credit Union* v *Wallen*, 779 P2d 956 (Nev 1989), the court rejected similar claims by a worker who argued that she had understood she would have her job as long as she performed her duties. She testified that she had indicated to the employer at the time of the application that she was seeking permanent employment and that she had entered into all of the employer's long-term employee benefit programs. Id at 957-58. The court held that this evidence "established nothing more than Wallen's subjective expectations of continued employment, and . . . is legally insufficient to rebut the presumption of at-will employment." Id at 958.

[3] Like the plaintiffs in *Vancheri* and *Bally's*, plaintiffs here only offered evidence of their unilateral expectations, based on common employment policies that are compatible with either at-will or dismissal-for-cause-only employment. Generous benefit packages, disciplinary procedures and general expressions of encouragement by management are all generic features of many employment relationships.[1] These factors are insufficient as a matter of Nevada law to rebut the presumption of at-will employment.[2]

[4] Thus, the only factor which the jury properly could consider in deciding the employment contract question is whether Hilton management agreed to terminate the plaintiffs only for

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[1]To the extent that plaintiffs are asking us to look to the employee handbook to support their claims, we note that no provision in the handbook modified the employer's right to fire employees at will. See *Sands Regent* v *Valgardson*, 777 P2d 898, 899 (Nev 1989); *Smith* v *Cladianos*, 752 P2d 233, 235 (Nev 1988). Plaintiffs offered no objective evidence to support a jury finding that the handbook became part of any employment contract. See *D'Angelo* v *Gardner*, 819 P2d 206, 209-11 (Nev 1991).

[2]Plaintiffs cite no case in support of their argument that longevity of service can rebut the at-will presumption in Nevada. Indeed, other states have held that longevity of service *cannot* convert an at-will contract into one providing for termination only for cause. See *Roberts* v *Atlantic Richfield Co.*, 568 P2d 764, 769 (Wash 1977) (en banc).

failure to perform satisfactorily.[3] In *American Bank Stationery v Farmer*, 799 P2d 1100, 1102 (Nev 1990), the Nevada Supreme Court held that an employee may rebut the at-will presumption "by proving by a preponderance of the evidence that there was an express or implied contract between his employer and himself that his employer would fire him only for cause." We hold that the evidence was insufficient as a matter of law to establish such a contract, and thus that it was error for the jury to consider the question. Its finding of an implied contract must be reversed.

[5] Plaintiffs place great reliance on the fact that pit boss Art Castle testified that he told every dealer he hired "They'd have to get so far out of line that there would be no cause for action other than to terminate them." RT VI 140 (paraphrasing shift boss Bud Haines's purported policy). Read in context, however, this testimony does not support the plaintiffs' case. Castle testified that "[e]very time a dealer was hired in the place, I gave them this spiel, more or less. I called it a 'spiel' — that they were *part of the Hilton family* and that the only way they could be terminated was to terminate

[3]The dissent argues that the preceding evidence, although insufficient as a matter of Nevada law to establish an implied contract of employment, was nevertheless "properly considered by the jury because the *collective* evidence raised a question of fact whether the at-will presumption had been rebutted, even if some of the evidence, considered *in isolation*, would have been insufficient." Dissent at 4 (emphasis in original). With due respect to our dissenting colleague, we cannot agree that the confluence of several factors, none of which is by itself sufficient to establish the existence of an employment contract, can establish such a contract when aggregated. We read the Nevada Supreme Court's cautious language that a certain factor does not "in and of itself," *Vancheri*, 777 P2d at 369, establish an employment contract to mean only that such evidence is relevant and, when coupled with a factor that *can* establish a contractual relationship, add probative weight to the plaintiff's case. A contract is, after all, a legal relationship which requires a meeting of the minds between the contracting parties. Individual factors that do not, as a matter of law, establish such a meeting of the minds cannot, by some peculiar alchemy, create a legally binding relationship when combined with each other.

themselves." RT VI 139-40 (emphasis added). But every one of the plaintiffs was employed at the casino (then the International) *before* Hilton took over in 1972. See RT V 3. Thus Castle's statement doesn't help plaintiffs; there is no evidence that he gave *them* "this spiel."

Indeed, there is evidence from the plaintiffs' testimony that they were *not* told they would have a job as long as they performed satisfactorily. The following excerpts from the trial are typical:[4]

> [Q:] "Do you know what Mr. Haines' policy was [regarding termination]?"
>
> . . .
>
> [A:] "You'd pretty much have to terminate yourself."
>
> . . .
>
> [Q:] "Did Mr. Haines ever directly tell you anything along those lines?"
>
> [A:] "*He never directly told, but I was very confident.*"
>
> RT XII(A) 12 (Kustudia direct).
>
> . . .
>
> [A:] "*It was the understanding* that if you were to be terminated, you'd — if you were terminated, you'd terminate yourself. . . . *That was just a feeling.*"

[4]In these and the following excerpts from the trial testimony, emphasis has been supplied.

RT XII(A) 117 (Kustudia cross).

* * *

[Q:] "Okay. At the time you were hired, you had no conversation with Mr. Haines about how long you would be employed. Is that true?"

[A:] "That's true."

[Q:] "And you had no discussions about the reasons for which you might be terminated. Is that true?"

[A:] "No, we had no discussions about — he gave me the list of rules. *I assumed* that if I followed all the rules and did my job properly, that I'd be okay."

RT XX 2-3 (Stanford cross).

* * *

[Q:] "In other words he didn't say that you're going to work for Hilton until you drop dead or anything like that?"

[A:] "He didn't say that. *You had that impression* — as long as you done your job, you always had a job."

[Q:] "Now, that phrase gets used a lot in these depositions. Did he say that to you?"

[A:] "I don't recall if he said it, it was like his policy."

[Q:] "Written?"

[A:] "I never seen it written."

[Q:] "Did you ever hear him say it?"

[A:] "Personally, no."

RT XXIII 153-54 (Neill deposition).

[6] A generalized understanding of job security based on satisfactory performance cannot create an implied contract of employment. The Nevada Supreme Court has considered testimony strikingly similar to that in this case: "I *understood* as far as a contract between [the employer] and I that I — as long as I performed my duties, I would have a job." *Bally's*, 779 P2d at 957 (emphasis the court's). The court found the employee's understanding insufficient as a matter of law to support a jury finding of a for-cause employment contract.

In fact, it appears that the plaintiffs only expected to continue in Hilton's employ, or assumed they would not be fired:

[Q:] "But you don't recall at any time anyone in management at Hilton saying that your job was secure as long as you perform satisfactorily, do you?"

[A:] "*That was an insinuation.*"

[Q:] "But that was never said to you?"

[A:] "No, I never had any real discussion with management in that respect."

RT XXIII 36 (Hineline cross).

* * *

[A:] "*You assume* when you take a job, that if you do your job, you're going to work there for-

ever. *That's just an assumption I think everyone in the world has.*"

RT XXIII 78 (Rexroad cross).

* * *

[Q:] "Did you have an understanding as to why you could be fired from your job?"

[A:] "Well, *the general understanding was* that if you didn't do your job."

RT XIII(A) 29 (Newman direct).

The Nevada Supreme Court has clearly stated, however, that "[c]ontracts of employment cannot be created by the subjective expectations of an employee." *Vancheri*, 777 P2d at 369. In *Vancheri*, the employee testified to his "understanding" that he would not be fired at will, but the court held as a matter of law that no employment contract existed.

[7] Some of the plaintiffs had a slightly different version of the "Haines policy":

[A:] "... John Stewart ... assured me personally that I was doing a very good job, he was very happy with my work, and I had a job at the Hilton *as long as I wanted one.*"

...

[A:] "Bud Haines told me pretty much the same thing. ... [H]e said that I would have a job at that hotel or with Hilton *as long as I wanted one.*"

RT XXVI(A) 6-7 (Drake direct).

* * *

[A:] "I took the job, *I assumed* if I did my job in the way that they wanted me to, that I would keep the job *as long as I wanted it.*"

RT X 31 (Saunto direct).

The Nevada Supreme Court has held that an employee's expectation of working as long as he wants is probative of an at-will relationship: Because the employee is free to leave any time before then, the employer can fire him at will. *Bally's*, 779 P2d at 958. There, the employee testified that she was told she'd be employed "I guess for as long as you care to work." Id (emphasis deleted). The court held as a matter of law that no for-cause contract was created: "This testimony described nothing more than agreement of employment for an indefinite term, and . . . such an agreement is characteristic of an at-will relationship." Id; see also *Vancheri*, 777 P2d at 370: "we hold that general expressions of job longevity and advancement . . . are not, as a matter of law, sufficient to establish a prima facie case rebutting the at-will employment presumption."

Furthermore, it is doubtful whether statements such as the "Haines policy" can support an implied contract at all. The Washington courts have explicitly held otherwise. *Lawson* v *Boeing Co.*, 792 P2d 545, 548 (Wash App 1990) ("repeated oral promises that so long as job performance met a certain level [the employee] would retain his supervisory position" not sufficient to raise an issue of fact), review denied, 811 P2d 219 (Wash 1991). We have also so held, construing Washington law. *Smoot*, 942 F2d at 1409, 1411 (statement to employee that "if you do a job — your performance is right, as long as there is a job there, I don't see any reason why it wouldn't be you" insufficient evidence of employment contract to go to jury). The Nevada Supreme Court frequently looks to Washington law in employment cases. See, for exam-

ple, *Vancheri*, 777 P2d at 369 (citing and relying upon *Irwin Concrete, Inc.* v *Sun Coast Properties, Inc.*, 653 P2d 1331 (Wash App 1982), and *Roberts* v *Atlantic Richfield Co.*, 568 P2d 764 (Wash 1977)).

[8] A fair number of the plaintiffs were told nothing at all. The following exchanges are representative:

> [Q:] "At the time Hilton bought [the International], did Mr. Newman say anything to you about how long you could expect to work for Hilton?"
>
> [A:] "*No*, sir."
>
> [Q:] "Or why you could be fired by Hilton?"
>
> [A:] "*No*, sir."
>
> [Q:] "Did Mr. Haines say anything like that to you?"
>
> [A:] "*No*."
>
> [Q:] "Either about how long you could expect to work or why you could be fired?"
>
> [A:] "*No*, sir."
>
> [Q:] "*Nobody said anything like that to you*?"
>
> [A:] "*No*, sir."
>
> RT XXXV 26 (Shailer deposition).

* * *

> [Q:] "And when Hilton acquired the International, they also, neither Mr. Newman or Mr. Haines

— neither of them said anything to you on [how long your job was going to last or the reasons you could be terminated]?"

[A:] "*No.*"

[Q:] "And at anytime after that at the Hilton, and anytime during your employment at the Hilton, none of your supervisors said anything to you about how long your employment was going to last, did they?

[A:] "*No.*"

[Q:] "Or what the reasons you could be fired were?"

[A:] "*No.*"

[Q:] "And you also never read any documents that discussed either of those subjects, right?"

[A:] "*That's right.*"

[Q:] "And otherwise, other than what anybody might have told you or what was in any document, other than that, you didn't have any independent understanding as to how long your employment was going to last?"

[A:] "*No, I was never told anything.*"

RT XXXIV 17 (Zarro cross).

The Nevada Supreme Court has held on similar facts that the employees were employed at will. *Smith*, 752 P2d at 234. There, as here, there was no written contract and no specific termination date. "Smith was nothing more than an at-will

employee. As such, she was subject to employment termination at any time, so long as the purpose for termination did not offend the public policy of the state of Nevada." Id at 235.

[9] Finally, some of the plaintiffs expressly recognized the at-will nature of the employment relationship:

> [Q:] "Prior to the time of your termination from the Hilton, did you believe that Mr. Kelly could fire you for no reason?"
>
> [A:] "*Yes*. That's why I was concerned."
>
> RT XVIII(A) 50-51 (Dudley deposition).
>
> . . .
>
> [Q:] "So you understood . . . that Mr. Kelly had the right to fire you for whatever reason?"
>
> [A:] "Oh, I would guess so, *yes*. *Yeah*. Whether he had the right or not, I certainly believe he could terminate people."
>
> RT XVIII(A) 51 (Dudley cross).
>
> * * *
>
> [Q:] "Are you saying that you continued to rely upon the fact that as long as you did your job you had a job?
>
> [A:] "*I relied on my own ability to do my job to maintain my job.*"
>
> RT XI(A) 9 (Saunto direct).
>
> . . .

> [A:] "My job at that time *was in the hands of the Hilton Corporation.*"
>
> RT X 108 (Saunto direct).

Where the employees themselves acknowledge that they hold their jobs only by the employer's good graces, it cannot seriously be argued that an implied for-cause contract exists.

Almost a century ago, Oliver Wendell Holmes wrote a passage that bears frequent repetition: "[T]he making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs, — not on the parties having *meant* the same thing but on their having *said* the same thing." *The Path of the Law*, 10 Harv L Rev 457, 464 (1897). This salutary principle has been adopted by the Supreme Court of Nevada as the governing law of employment disputes. *Hotel Riviera, Inc.* v *Torres*, 632 P2d 1155, 1157 (Nev 1981) (quoting Holmes). It thus controls this case.

[10] The jury was charged to consider the contract issue as to the plaintiffs collectively. The evidence was overwhelming that defendant was silent on the grounds for termination. Bud Haines's fire yourself policy was a general understanding rather than a term of the agreement at the time of employment. It may even have expressed indefinite employment, which is indicative of an at-will relationship. In any event, the plaintiffs' subjective expectations cannot transform employment at will into a for-cause relationship. And many of them were told nothing about the terms of employment, leaving Nevada's at-will presumption firmly in place. Some even recognized explicitly the at-will nature of their employment. As a matter of Nevada law, the plaintiffs were employed at will and therefore could be dismissed at will.[5]

[5]The dissent relies partially on statements made by management long after these employees were hired at Hilton. See dissent at 2507-12. All of

It's true that a few of the plaintiffs testified that Haines or another manager told them that they would have their job as long as their performance was satisfactory. As noted, we have recently held a nearly identical statement insufficient as a matter of Washington law to create a jury question on the existence of an implied contract. *Smoot*, 942 F2d at 1409, 1411. Even if such statements *were* sufficient to establish an implied contract, they could not sustain the verdict in this case. The court's instructions, as well as the verdict form, called for a determination of liability as to the plaintiffs as a group. Stray statements directed to a small number of individual employees cannot sustain a finding that there was an implied contract as to the group as a whole, when the large majority of the group members stated that no such statements were made to them, that they were advised to the contrary or that they were aware the contract was at will. See pages 2479-87, supra. Any other conclusion would raise doubts about the constitutionality of the group adjudication of liability, an issue vigorously raised by Hilton in this appeal. See section IV, infra.

[11] The Nevada Supreme Court's most recent employment decision, *D'Angelo*, does nothing to alter this analysis. In that

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these statements — from meetings following the fire, the St. Patrick's Day massacre and the 1983 management firings — are consistent with the at-will nature of the plaintiffs' employment. If encouraging employees to stay on board after a shakeup or tragedy gives rise to for-cause contracts with all those employees who stay, employers will have to stop giving routine pep talks. Furthermore, while the terms of employment may be changed during the time of employment — for example, a previously at-will employee might be given an employment contract — the plaintiffs' theory in this case was that they were covered by an implied contract *from the date they were hired*. In closing argument, for example, plaintiffs' counsel focused on "what the evidence was as to just what the understanding was, what the meeting of the minds was, between these men and Hilton *back in 1970 and '71 when it bought the International*." RT XLVII 31 (emphasis added). Because no reasonable jury could have found an agreement at that time, the later expressions by management are irrelevant to the issues before us.

case, the court recognized that there can be implied employment contracts, and held on the facts before it that the plaintiff had presented sufficient evidence to go to the jury on the issue. 819 P2d at 209-11. "The issue here," the court stated, "is simply whether the employee should be denied his day in court and not allowed to present evidence." Id at 209 n 3. In this case the employees were given ample opportunity to present evidence of such a contract. As demonstrated above, however, the evidence presented was insufficient as a matter of Nevada law to create an implied contract and thus never should have been submitted to the jury. The *D'Angelo* court expressly disclaimed the notion that "*any* determination by [an employer] to terminate an employee is contestable before a jury." Id (emphasis added; internal quotations omitted). It also endorsed *Vancheri*, which is factually similar to this case and where the court dismissed the plaintiff's claims after he had put in all his evidence. See *D'Angelo*, 819 P2d at 211: "Mr. Vancheri failed, as a matter of law, to establish an agreement, express or implied, between his employer and him, that granted to him the right of continued employment." So too here. It was error to allow the jury to consider the implied contract issue, and plaintiffs cannot recover damages for breach of contract.

[12] Nor can they recover in tort. It may be true that Hilton's stated reasons for firing the employees do not square completely with the facts. But Hilton was not required to give any reason at all for its action. "[A] bad faith discharge tort cannot be committed against an at-will employee ...." *D'Angelo*, 819 P2d at 212.[6]

[6]Nevada law recognizes two torts related to employment termination: Bad faith discharge, which is based on firing the employee in violation of the implied covenant of good faith and fair dealing in the employment contract, and tortious discharge, which is based on firing the employee in violation of public policy. *D'Angelo*, 819 P2d at 211-12. In the absence of an employment contract, a plaintiff can recover only under the latter theory. Id at 216. "The prototypical tortious discharge case is [*Hansen* v

Because plaintiffs were employed at will, Hilton was entitled to discharge them at will. They cannot maintain a cause of action under Nevada law for breach of contract or bad faith discharge. *Sands Regent*, 777 P2d at 899 ("[B]oth breach of contract and bad faith discharge presuppose that the parties had an employment agreement."). The district court erred in allowing the jury to consider the existence of an implied contract, when no such contract could have existed as a matter of Nevada law. Cf. *Smoot*, 942 F2d at 1411-12 (district court faced with similar facts erred in not granting a directed verdict or JNOV under Washington law). The damages awarded under these theories must be vacated.[7]

II. *Intentional Infliction of Emotional Distress*

[13] Because plaintiffs were at-will employees, Hilton was entitled to terminate them without cause. Hence, their discharge did not amount to the type of willful misconduct that could serve as a predicate for the tort of intentional infliction of emotional distress. See *Alford* v *Harolds Club*, 669 P2d 721, 724 (Nev 1983) (per curiam) (upholding dismissal of plaintiffs' claims for intentional infliction of emotional distress arising from their terminations for refusal to comply with a tip pooling policy, because the tip pooling policy was legal and hence their terminations could not be wrongful).

Harrahs, 675 P2d 394 (Nev 1984)], in which an employee claimed to have been discharged to penalize him because he had filed a workers compensation claim." Id. No such conduct is alleged in this case. In fact, the Nevada Supreme Court has "refused to recognize an action for tortious discharge even though the defendant had clearly violated Nevada's public policy against age discrimination." Id at 216-17 (citing *Sands Regent*, 777 P2d at 900). In any event, "[n]o public policy tort was pursued by Plaintiffs." Supplemental Brief of Appellees/Cross Appellants at 9. Plaintiffs cannot recover for tortious discharge.

[7]Because plaintiffs were not entitled to any damages for breach of contract or bad faith discharge, we need not address their argument that they should have been awarded emotional distress damages for bad faith discharge.

[14] Even had plaintiffs managed to establish that the terminations were wrongful, Nevada does not recognize a cause of action for intentional infliction of emotional distress in the employment termination context. Plaintiffs point to *MGM Grand Hotel-Reno, Inc.* v *Insley*, 728 P2d 821 (Nev 1986), and *Alford*, 669 P2d 721, but neither case supports this position. *Alford*, as already discussed, was resolved on other grounds. In *MGM Grand*, the Nevada Supreme Court held only that plaintiff's claim for intentional infliction of emotional distress against his employer for conduct related to his industrial accident claim was not preempted by federal labor law. 728 P2d at 825. The court declined to address the issue in its most recent employment decision. *D'Angelo*, 819 P2d at 211, 219 n 13. Since the Nevada Supreme Court has given no indication that the emotional distress cause of action applies in the employment termination context, and the issue is open elsewhere,[8] the district court erred in instructing the jury on this cause of action.[9]

III. *Punitive Damages*

Hilton argues that plaintiffs are not entitled to punitive damages as a matter of Nevada law. It also raises constitutional challenges to the punitive damages award. We hold that the award was improper under Nevada law and therefore do not reach the constitutional issues.

[15] Under Nevada law, a punitive damages award must be based on a cause of action sounding in tort. *Sprouse* v *Wentz*, 781 P2d 1136, 1138 (Nev 1989) (per curiam). Since plaintiffs

[8]The California Supreme Court will soon consider the issue for the first time. *Lanouette* v *Ciba-Geigy Corp.*, 272 Cal Rptr 428, review granted, 275 Cal Rptr 420 (Cal 1990).

[9]We need not address Hilton's argument that the award of prejudgment interest on the emotional distress damages was improper under Nevada law. As we have struck down the damages award, the prejudgment interest falls with it.

cannot recover for bad faith discharge or for intentional infliction of emotional distress, they are left without a state law tort to support their punitive damages award.

IV. *Group Determination of Liability and Damages*

Hilton argues that allowing the jury to determine liability and damages on a group basis for the contract and tort causes of action violated its seventh amendment right to a jury trial, as well as the *Erie* doctrine and the due process clause. Because of the way we have resolved the state law issues, see esp. pages 2488-89, supra, we need not reach this difficult question.

V. *ERISA Preemption*

Hilton argues that plaintiffs' state law claims are preempted by the Employment Retirement Income Security Act (ERISA), 29 USC §§ 1001 et seq, the federal statute that governs employee benefit plans. We need not reach this issue because we have struck down the state law damage awards on other grounds.

VI. *ADEA Issues*

[16] The EEOC raises two issues regarding the damages awarded under the ADEA. First, it argues that plaintiffs should have been awarded liquidated damages in addition to back pay. Second, it argues that the district judge erred in refusing to allow the jury to award front pay. Because we have struck down the punitive damages award, these issues are easily resolved on the basis of concessions made by Hilton and the EEOC.

A. *Liquidated Damages*

[17] The jury found that Hilton's ADEA violation was willful, CR 441, Question 1A, yet did not award liquidated dam-

ages under 29 USC § 626(b). Plaintiffs and the EEOC argue that liquidated damages are mandatory once a willful violation is found. We need not resolve this issue because Hilton has made the following concession:

> Because it is impossible to tell whether the punitive damages award contains a hidden award of federal liquidated damages, Hilton concedes that it would be appropriate, if the punitive damage award is reversed or remitted below $1,427,048.00 [the amount of back pay awarded to the ADEA plaintiffs], for this Court to reinstate that award up to that amount in order to ensure that the jury's finding of willfulness, which Hilton does not contest here, is implemented according to the ADEA's statutory purposes.

Hilton's Brief in Reply to the Responsive Brief of Plaintiffs and in Response to the Briefs on Cross-Appeal of Plaintiffs and the EEOC, at 87 n 52. Accordingly, liquidated damages should be awarded in this case; the ADEA plaintiffs' back pay award should be doubled.

B. *Front Pay*

[18] Plaintiffs and the EEOC argue that the court erred in instructing the jury that it could not award front pay. The EEOC conceded in its brief, however, that "if the present verdict stands or if liquidated damages are awarded, the district court's failure to allow an award of future damages may not be an abuse of discretion under the law of this Circuit." Brief of the EEOC as Cross-Appellant, at 13 n 19. We have ruled that plaintiffs must be awarded liquidated damages. Because plaintiffs will be getting double back pay, we conclude that the district court did not abuse its discretion in declining to award front pay. See *Cancellier* v *Federated Dep't Stores*, 672 F2d 1312, 1320 (9th Cir), *cert denied*, 459 US 859 (1982).

VII. *Plaintiff Foltz*

[19] Plaintiff Foltz challenges the sanctions imposed by the district court for his refusal to provide information regarding his income, taxes and employment during the discovery process. He argues that the sanctions were improper because he based his refusal on the fifth amendment privilege against self-incrimination. In the alternative, he argues that the sanctions were excessive.

We undertake a two-part inquiry in reviewing a discovery sanction when the party has asserted a fifth amendment privilege: "(1) did the party resisting discovery *properly* assert his Fifth Amendment privilege, and (2) if not, did the district judge abuse his discretion in imposing the sanction involved." *Davis* v *Fendler*, 650 F2d 1154, 1159 (9th Cir 1981) (footnote omitted), citing *Baker* v *Limber*, 647 F2d 912 (9th Cir 1981).

[20] Applying the first part of this test, we find that Foltz did *not* have a fifth amendment privilege concerning the requested information and records. Foltz' concern is that disclosure of this information might have subjected him to prosecution for tax crimes. But the fifth amendment's self-incrimination clause does not give taxpayers a right to withhold financial information from the IRS unless they can show an appreciable possibility of prosecution for a *non-tax* crime. *Fuller* v *United States*, 786 F2d 1437, 1439 (9th Cir 1986). We have applied this principle in the civil discovery context, upholding dismissals of taxpayers' actions for redetermination of deficiencies when taxpayers refused to comply with the IRS's discovery requests on fifth amendment grounds. *McCoy* v *CIR*, 696 F2d 1234, 1236 (9th Cir 1983); *Edwards* v *CIR*, 680 F2d 1268, 1270 (9th Cir 1982).

Since Foltz could not assert the fifth amendment vis-a-vis the IRS directly in the civil discovery context when he faced the possibility of incriminating himself with regard to tax crimes, it is difficult to see how he could have a fifth amend-

ment privilege vis-a-vis third parties. Foltz cites no authority for such a privilege and it is doubtful that any such authority exists. Plaintiffs who voluntarily come into court and seek economic damages must be prepared to prove their economic loss: "The scales of justice would hardly remain equal . . . if a party can assert a claim against another and then be able to block all discovery attempts against him by asserting a Fifth Amendment privilege to any interrogation whatsoever upon his claim." *Lyons* v *Johnson*, 415 F2d 540, 542 (9th Cir 1969), *cert denied*, 397 US 1027 (1970).

[21] Although sanctions were appropriate because Foltz did not have valid reasons for resisting discovery, we conclude that the sanctions imposed in this case were excessive. The district judge shut Foltz out of any recovery.[10] This was an abuse of discretion because Foltz only withheld information that pertained to his claims for economic loss. His refusal did not prevent the jury from assessing his claims for emotional distress, punitive damages or reinstatement to the pension plan. Hence, the court was justified in determining that he could not recover economic damages such as back pay, but erred in barring him from other relief. We have overturned the punitive damages and emotional distress awards, but Foltz must be reinstated to the pension plan.

VIII. *Plaintiff Delling*

Plaintiff Delling contests the district court's factual finding regarding the date he became disabled.[11] The court found that

[10]This sanction was equivalent to dismissing Foltz's lawsuit, a sanction we have held must be applied sparingly. See *Campbell* v *Gerrans*, 592 F2d 1054, 1058 (9th Cir 1979) ("The sanction of judgment by default for failure to comply with discovery orders is the most severe sanction which the court may apply, and its use must be tempered by careful exercise of judicial discretion to assure that its imposition is merited," quoting *Trans World Airlines* v *Hughes*, 332 F2d 602, 614 (2d Cir 1964), *cert dism'd*, 380 US 248-49 and 380 US 249 (1965).).

[11]The court, rather than the jury, made this factual finding because the court awarded compensation for lost retirement benefits as an equitable

Delling became disabled on October 15, 1985, and would have left Hilton's employ on February 20, 1986. Delling contends that the correct disability date is June 1, 1986.

We conclude that this factual determination had adequate support in the record. The district court adopted the disability date used by Hilton's expert economist in a report on plaintiffs' damages. Exhibit B-L, at 2. The expert based this date on a statement of Delling's earnings record produced by the Social Security Administration. Id at 14, n 5. Delling argues that his trial testimony establishes the later date. His trial testimony, however, mentions several possible disability dates. For purposes of obtaining unemployment benefits, he claimed that he was disabled as early as September 1984. RT XXXI-I(A) 53-54. He later applied for social security disability benefits and claimed that the onset of his disability was in 1985. Id at 56-58. He also testified that he considered himself to be totally disabled and not able to work after a hospitalization in the middle of 1986. Id at 45-46. He concedes that he did not in fact work after August 1985, when he was fired from a taxi driver job because he could not lift luggage. Brief of appellees/cross-appellants, at 83 n 98.

Considering all the evidence, the district court's finding that Delling became disabled on October 15, 1985, was not clearly erroneous.

Conclusion

Plaintiffs were victims of age and sex discrimination and will recover damages under Title VII and the ADEA. The plaintiffs who recovered under the ADEA are also entitled to

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remedy in the Title VII action, after the jury verdicts came in. CR 493, at 2-3. The court decided that the "equitable method for awarding Plaintiffs lost retirement benefits [was] to utilize the existing provisions of the Hilton Hotels' Retirement Plan." Id at 3.

liquidated damages. Plaintiffs are not entitled to additional contract or tort damages under Nevada law. The awards for breach of contract and bad faith discharge, emotional distress and punitive damages are vacated. Plaintiff Foltz is entitled to reinstatement to the pension plan.

The judgment is **REVERSED** and the case is **REMANDED** for entry of judgment consistent herewith.

BOOCHEVER, Circuit Judge, concurring and dissenting Nos. 90-15424, 90-15460 and 90-15623

The principal issue presented by this appeal is whether there was sufficient evidence to present a jury question regarding an implied contract of employment between the Las Vegas Hilton and its 37 fired employees. Because it misconstrues Nevada law in resolving this issue, the majority dismisses categorically several types of evidence which the jury properly considered. The majority also mischaracterizes the evidence consisting of Hilton's numerous assurances to plaintiffs that they would be terminated only for cause, as nothing more than the plaintiffs' subjective expectations or a few "stray statements." Not only do I believe that the totality of the facts support a triable issue which was properly submitted to the jury, but I fear that the majority's interpretation of Nevada law regarding implied contracts seriously erodes the factfinding function of the jury. I respectfully dissent.

I.

Under Nevada law, the at-will presumption may be rebutted by evidence of an implied contract of employment. *See Bally's Grand Employees' Fed. Credit Union v. Wallen*, 779 P.2d 956, 957 (Nev. 1989) (per curiam). If such evidence exists, the factfinder may determine whether an employer has "a contractual obligation not to discharge the employee with-

out first abiding by conditions relating to dismissal which are either expressly agreed upon by the parties or inferable from the dealings and practices of the parties." *D'Angelo v. Gardner*, 819 P.2d 206, 209 (Nev. 1991). *See also K Mart Corp. v. Ponsock*, 732 P.2d 1364, 1366 n.1 (Nev. 1987) (recognizing that the at-will presumption can be rebutted by even "a tacit agreement [which] was implied in fact from the conduct of the parties").

The factfinder may consider various types of evidence in determining whether an implied "for-cause" employment contract existed. An employee handbook or detailed procedures for discipline and dismissal of employees may be evidence of an enforceable contract. *See Southwest Gas Corp. v. Ahmad*, 668 P.2d 261, 261-62 (Nev. 1983) (employee handbook); *D'Angelo*, 819 P.2d at 212-13 (disciplinary procedures listed in handbook). Other relevant evidence may be the "dealings and practices of the parties," *id.* at 209, and expressions of job security conditioned upon satisfactory job performance. *See K Mart*, 732 P.2d at 1366 n.1 (finding the at-will presumption rebutted by, *inter alia*, employer's oral and written "represent[ation] to [plaintiff] that he would remain on the job until he retired as long as he did his job satisfactorily"). It is less clear whether longevity of employment can support a finding of an implied contact, although it is relevant in analyzing whether a bad faith discharge claim exists. *See D'Angelo*, 819 P.2d at 215 (suggesting that an employee with almost ten years of employment would be more likely to prevail on a bad faith tort claim than one with less than two years employment). Any one of these factors alone is often insufficient to defeat the at-will presumption. *See, e.g., Vancheri v. GNLV Corp.*, 777 P.2d 366, 369-70 (Nev. 1989) (refusing to find that the establishment of disciplinary procedures for employees "in and of itself" rebuts the at-will presumption). Rather, it is the totality of the circumstances surrounding the employment relationship that must be examined. *See Stone v. Mission Bay Mortgage Co.*, 672 P.2d 629, 629-30 (Nev. 1983) (per curiam) (reversing summary judgment for

employer despite employee's signed application agreeing that she could be terminated at any time, because other evidence raised a question of fact as to whether the application was intended to be the contract between the parties).

Here, the plaintiffs' evidence included: (1) the longevity of their employment, ranging from 11 to 17 years; (2) a written handbook setting forth rules providing the basis for discipline and termination; (3) Hilton's practice of giving written warnings before terminating employees; (4) statements by Hilton management that the plaintiffs would have their jobs, so long as they performed their jobs satisfactorily; (5) promises by Hilton management following layoffs in 1982 and 1983, that "there will be no more layoffs" and "no more terminations"; (6) assurances of job security when discouraging a union organizing effort; and (7) statements that the plaintiffs were part of "the Hilton family." Under Nevada law, the totality of the circumstances presented by the evidence raised a question of fact for the jury to decide whether there was an implied contract of employment.

A. *Evidence Other Than Hilton's Representations*

The majority dismisses several types of relevant evidence, by concluding that general expressions of long-term employment, standard disciplinary procedures, longevity of service, and subjective expectations of continued employment should not have been considered by the jury at all. *See* Majority Opinion, at 2475-79. In fact, all the evidence presented by the plaintiffs, taken as a whole, was properly considered by the jury because the *collective* evidence raised a question of fact whether the at-will presumption had been rebutted, even if some of the evidence, considered *in isolation*, would have been insufficient.

I agree with the majority that "[g]eneral expressions of long term employment or job advancement" or "the establishment of standard disciplinary procedures . . . *in and of itself*" is

insufficient to convert an at-will employee to a for-cause employee. *Vancheri*, 777 P.2d at 369-70 (emphasis added). Similarly, no one disputes that evidence "establish[ing] *nothing more than* . . . subjective expectations of continued employment, . . . is legally insufficient to rebut the presumption of at-will employment." *Bally's*, 779 P.2d at 958 (emphasis added). Although, as I have indicated, Nevada law is less clear about the relevance of longevity of service in determining whether an implied contract exists, *cf. D'Angelo*, 819 P.2d at 215, I will assume, *arguendo*, that longevity of service alone is also insufficient to rebut the at-will presumption.

The problem lies in the leap of logic made from these statements of law. Taken together, these cases merely stand for the proposition that any one or, at best, two of the following factors — general expressions of long-term employment, the establishment of disciplinary procedures, longevity of service, or an employee's subjective expectations — do not defeat the at-will presumption. *See, e.g., Vancheri*, 777 P.2d at 370 (general expressions of job longevity and disciplinary procedure described in that case are insufficient to rebut the at-will presumption). These cases, however, say nothing about the relevance of such evidence *when they constitute only part of the cumulative case-in-chief presented by a plaintiff*. Indeed, given the care with which the Nevada Supreme Court qualified its holdings, *Vancheri* and *Bally's* actually imply that general expressions of long-term employment or disciplinary procedures, when considered with other types of evidence, must be considered by a jury to resolve whether an implied contract existed. This understanding of *Vancheri* — that only a limited set of facts will completely bar jury resolution of the implied contract issue — was recently confirmed by the Nevada high court's own description of that case: "We said in *Vancheri* that the *mere* establishment of [disciplinary] procedures by an employer would not *'in and of itself'* create an obligation of continued employment." *D'Angelo*, 819 P.2d at 211 (emphasis added).

Thus, an inadvertent flaw in logic leads to the majority's conclusion that "the only factor which the jury properly could consider in deciding the employment contract question is whether Hilton management agreed to terminate the plaintiffs only for failure to perform satisfactorily." *See* Majority Opinion at 2478-79. Nevada law does not support that majority linchpin. Therefore, I would find that the jury properly considered, in resolving the implied contract question, the evidence of Hilton's progressive disciplinary system as set forth in its employee handbooks, its longstanding practice of providing warnings prior to terminating employees, its general expressions of long-term employment, the longevity of the plaintiffs' satisfactory service, and the inducements extended by Hilton to retain the plaintiffs.

II. *Specific Representations of For-Cause Employment*

Turning to the crux of the plaintiffs' case, the majority characterizes Hilton's representations as nothing more than the plaintiffs' "subjective expectations" that they would not be fired. It further claims that the "large majority" of the plaintiffs did not receive such assurances or that they were advised to the contrary. *See* Majority Opinion, at 2488-89. In doing so, the majority overlooks the substantial evidence of specific promises and representations by Hilton management that the plaintiffs' employment would continue, as long as the plaintiffs performed satisfactorily. Moreover, the majority's attempt to cast these representations as unfounded assumptions or "stray statements" is undermined by the fact that Hilton made some of these representations in response to specific employee concerns about job security during critical points in the Las Vegas Hilton's history. As the quantity, quality, and factual context of Hilton's representations indicate below, more than enough evidence existed for a jury to infer that Hilton modified the "at-will" relationship because it did not want the plaintiffs to leave their jobs.

1. *Representations at commencement of and during employment*

First, numerous plaintiffs testified that they had received from Hilton management assurances of "for cause" employment — i.e., employment as long as they did their jobs properly — at the time of their hiring or during their term of employment. The following excerpts from the trial are but a few examples:[1]

> [Q:] When you were hired at the Hilton, did you have any conversation with Mr. Haines or anyone else in management regarding how long you could expect to work there?
>
> [A:] Yes. As we were walking to see Newman, Mr. Haines told me that this was a good job, good working conditions, *and I'd never have to worry about my job as long as I did it, that I'd have — the only way I can be fired would be to fire myself.*
>
> RT XXXII(A)-9 (Delling direct).
>
> * * * *
>
> [Q:] Were you told anything by management with regard to job security?
>
> . . . .
>
> [A:] Well, I was told by Jimmy Newman that *for as long as I did my work properly, I'd have a job.*
>
> [Q:] And what was Jimmy Newman's position at the time?

[1]In the excerpts that follow, the emphases are mine.

[A:] He was the casino manager.

[Q:] Now, in 1971, when Hilton acquired the International, do you recall what changes, if any, occurred?

[A:] In management itself none, really. None that affected the dealers. All the management was pretty much still the same. Jimmy Newman was still the casino manager.

RT XXX-11-12 (Borsage direct).

* * * *

[Q:] Did anyone from Hilton management tell you anything about how long you could expect to be employed?

[A:] When I started after my dealers training program, Mr. Hybarger, he took me in the office and told me, said, "*As long as you do your job, and keep your nose clean, you don't have anything to worry about.*"

RT XX-34 (Pollins - direct).

* * * *

[Q:] Did you ever receive any assurances — did anyone from management ever say anything that led you to believe — that your job was secure?

[A:] Well, at the time that I was hired, Bud Haines told me that I was a good dealer; and it was his policy that *as long as we performed our job satisfactorily, that we would always have our jobs.* And I

> received numerous remarks of the same nature over the years from Bud Haines.
>
> RT XXIX(A) 60-61 (Landers direct).

See also RT XXIII-13 (Hineline); RT XXVIII-102 (Grace); RT XXIX-27 (Dawson); RT XXXI-9 (Prewitt); RT XXXII-49 (Jodra); RT XXXII(A)-9, 11 (Delling); RT XXXIV(B)-39, 42, 45, 53 (Penny); RT XIX-22 (Brooks).

The majority points out that Art Castle may not have told the plaintiffs at the time of their hiring that they could only be terminated by terminating themselves. *See* Majority Opinion at 2479-80. This is of little significance when the record reveals that other members of Hilton management *did* make such representations to some plaintiffs at the time of hiring and thereafter. *See Ahmad*, 668 P.2d at 262 (recognizing that employers and employees are free to modify the terms of their employment relationship after the commencement of employment).

The majority also presents selective portions of the plaintiffs' evidence to question the jury's determination that an implied contract existed between Hilton and the plaintiffs. *See* Majority Opinion, at 2479-83. Yet the majority fails to include testimony by the very same plaintiffs tending to diminish or place into context the impact of the selected excerpts. For example, plaintiff Stanford is quoted as "assuming" that his job would be secure as long as he complied with Hilton's rules and did his job properly. *See* Majority Opinion, at 2480-81. The majority, however, fails to point out that this assumption stemmed from management's practice of giving warnings before terminations:

> [A:] . . . Bud Haines always had a policy that as long as you did your job, you really wouldn't have any problem. It was kind of a fire-yourself type thing. If you had a problem, he would come to you and warn

> you. If you did it again, he may warn you again. And probably the third time you were out the door. But he always gave you a couple of chances to clean up your act.
> RT XIX-124 (Stanford direct).

Similarly, the majority quotes plaintiff Hineline to illustrate that plaintiffs had only expectations or assumptions about continued employment. *See* Majority Opinion, at 2482-83. Again, in doing so, the majority overlooks testimony which raises a question as to whether Hineline's assumptions arose from direct representations of job security from Hilton management:

> [A:] ... I had talked to Sam Belkan about ... whether or not I had anything to worry about as far as job security. And like I stated before, that he said that as long as I did my job, and kept my nose clean, I'd have a job. That was what he stated.
>
> RT XXIII-13 (Hineline direct).

Cross-examination is the "greatest legal engine ever invented for the discovery of truth." *California v. Green*, 399 U.S. 149, 158 (1970) (quoting 5 J. Wigmore, Evidence § 1367 (3d ed. 1940)). And often witnesses' testimony on direct examination is weakened by clever cross-examination. Other than in unusual cases, however, this merely presents a question for the jury as to the strength of the testimony. In evaluating this evidence, we must be mindful that "[t]he very essence of [the jury's] function is to select from among conflicting inferences and conclusions that which it considers most reasonable." *Schulz v. Pennsylvania R.R. Co.*, 350 U.S. 523, 526 (1956) (quoting *Tennant v. Peoria & P.U. Ry. Co.*, 321 U.S. 29, 35 (1944)). Moreover, "[i]t is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncer-

tain inferences." *Id.* at n.8 (quoting *Tennant*, 321 U.S. at 35). Thus, although the majority properly points out portions of the record tending to weaken the plaintiffs' case, other evidence from those same witnesses indicate that they had received assurances of continued employment and support the district court's decision that a jury question existed.

2. *Meeting following the Hilton fire*

Plaintiffs also presented evidence that, in the aftermath of the 1981 Hilton fire, management held a meeting to thank them for their willingness to volunteer as maids and porters as Hilton coped with the damage. During this meeting, management reassured the plaintiffs that their jobs were secure, despite the troubles that beset Hilton because of the fire:

> [Q:] Do you recall any other meeting where someone from Hilton management talked to you about job security?
>
> [A:] Well, the next meeting we had happened after the fire . . . . We were called to a meeting when we were supposed to be reintegrated back to work. . . . [Lewin told] us that the Hilton Corporation would open the hotel even with the tower still damaged by the fire, that he would open the hotel for us, the employees, because we were part of the Hilton family. And he told us that *we did not have to worry about our jobs with the Hilton as long as we continued working in the same manner we had worked to up to the fire.*

RT XXXII-49 (Jodra direct).

* * * *

> [Q:] Did Mr. Lewin say why he was holding this meeting?

[A:] No, but I think they was talking about — if I recall — going back to work [after the fire]. . . . But [Lewin] was talking, giving thanks to all of us for the job we performed in the hotel, you know. . . .

. . .

[Court:] Just tell us what [Lewin] said.

[A:] So *he said I've got a secure job. I've got no problems at all.*

RT XXX 81 - 82 (Torres direct).

3. *Preventing union organizing efforts at the Hilton*

The testimony at trial also revealed that Jimmy Newman, Hilton's casino manager, assured plaintiffs of job security in an attempt to discourage employee interest in joining a union:

[A:] There was [a union scare] . . . and Jimmy [Newman] wanted to nip it in the bud by talking to all of us, saying. . . you know, a union is a bad thing. . . . *That as long as you guys do what you're supposed to do you will have a secure job.*

RT XXXIV(B) 39 (Penny direct).

* * * *

[A:] . . . once we were having union talk going around. Mr. Newman talked to some groups and told us we had the best job in town and the best conditions and the best job security, and we didn't need a union.

[Q:] And did you believe that was true?

[A:] Yes.

RT XXXII(A)-11 (Delling direct).

4. *Meeting following the "St. Patrick's Day Massacre"*

The record also indicated that Hilton management held a meeting specifically to assure plaintiffs of job security after Hilton fired a large number of employees in the so-called "St. Patrick's Day Massacre" of 1982:

> [A:] There was a — the terminations we've been talking about, the St. Patrick's Day Massacre occurred, and there was some concern in the casino pits as to the reasons why. . . .
>
> And Mr. Lewin's first statement, I believe, was "This meeting is about job security. We've had a recession. We've had to let some people go. *There will be no more mass firings or terminations,*" and that we're all a big family. "This is the group we want. We're pleased with you people," . . .
>
> RT XIX-21 (Brooks direct).
>
> * * * *
>
> [A:] They had several major layoffs, and after two or three of them [Lewin] called another meeting. . . .
>
> . . . .
>
> [A:] . . . They just dumped off a bunch of people, two times, and they evidently heard that we were getting a little skittish, and to try to calm us down they had another meeting.
>
> . . . .

[A:] . . . And [Lewin] mentioned again about being a family and he wanted to do the best thing he can for us. That's about the only thing that really stood out in my mind that he talked about other than, you know, *he wanted to reassure us that our jobs were secure* . . . .

RT XXXIV(B) 46-48 (Penny direct).

* * * *

[Q:] Now after these mass terminations, were you at all concerned about your job?

[A:] No, ma'am, I really wasn't concerned with my job. . . . [B]ut, there was a lot of concern in the hotel. That was very obvious, simply because it was so noticeable that I think Hilton management decided to hold a meeting to try to insure [sic] people that there would be no more than that.

Mr. Lewin, I believe Mr. Hilton, Mr. Newman — there was a lot of people at that meeting. . . . *[Lewin] let us know that there would be no more of that [mass firings]*, and that we were a part of the Hilton Corporation. We were, as his words I might say, we were part of the Hilton family.

RT XXIII-50 (Rexroad direct).

5. *Assurances of no more firings after 1983 manageme firings*

The Hilton terminated several senior casino manageme officials the following year. The Hilton's blackjack pit ma ager John Stewart, however, personally assured numero plaintiffs that there would be no more terminations and t management was satisfied with the team it had in place:

[A:] . . . [Stewart] says, "*I realize there's a lot of apprehension around the hotel right now because of the recent firings, but that's over and done with and as far as we're concerned, you're on our team.*"

RT X-61 (Saunto direct).

* * * *

[A:] . . . [Stewart] come through and he told me personally and he was quite loud, you know. He said that *there will be no more terminations, everything is running beautiful now.* We did what we had to do, and *now there won't be any more terminations.* Everything will be fine from here on.

RT XXIV(A)-8 (Mikitaroff direct).

* * * *

[Q:] Did anyone from Hilton management ever say anything to you after Mr. Haines had left? . . . .

[A:] John Stewart — I think it was within a couple of days after Bud Haines had left . . . . [A]nd [Stewart] told us that *we had nothing to worry about, that there wasn't going to be any changes, that that was the end of the changes.*

RT XXIX(A)-61 (Landers direct).

* * * *

[A:] Well, John Stewart, he came up to the dealers' room after one of the big layoffs that they had . . . . [A]nd he said '*Hey, fellows, it's all over. There's not going to be any more firings, et cetera. Just do what*

you're supposed to do and your job is secure,' is what he said to these three guys at the card table.

RT XXXIV(B) 41-42 (Penny direct).

The majority characterizes the above evidence as nothing more than "[s]tray statements directed to a small number of individual employees." *See* Majority Opinion, at 2489. The record belies this characterization. At least two meetings, the meetings following the Hilton fire and the St. Patrick's Day Massacre, were held in part for the express purpose of assuring plaintiffs that their jobs would remain secure, notwithstanding the fire and layoffs that so troubled the employees. Senior Hilton management officials, including Chairman Barron Hilton, attended one of these meetings where promises of job security were made, thereby lending further legitimacy to these representations. *See* RT XXIII-50 (Rexroad direct).

The majority also seeks to cast doubt on the relevance of these many representations of job security by citing a Washington case and a federal diversity case applying Washington law. *See Smoot v. Boise Cascade Corp.*, 942 F.2d 1408 (9th Cir. 1991); *Lawson v. Boeing Co.*, 792 P.2d 545, 548 (Wash. App. 1990), *rev. denied*, 811 P.2d 219 (Wash. 1991). Nevada, not Washington law, governs this case. The Nevada Supreme Court has declared that such oral promises of job security, conditioned upon satisfactory job performance, can be considered in support of a finding that the at-will presumption has been rebutted. *See K Mart*, 732 P.2d at 1366 n.1.

Nevada courts have also observed that "employees may be induced by employers to . . . remain on the job by the conduct, policy and implied promises of the employer. Such employees may, accordingly, have enforceable rights which can be asserted in the courts." *D'Angelo*, 819 P.2d at 213 (discussing with approval *Foley v. Interactive Data Corp.*, 47 Cal.3d 654, 765 P.2d 373 (1988)). Here, substantial evidence indicates that the plaintiffs' expectations arose from Hilton's

affirmative representations of job security and of terminations only for cause. Thus, their expectations were not unilateral or unfounded. Given the factual backdrop of these assurances, a reasonable jury could conclude that Hilton's "conduct, policy and implied promises" revealed a desire to modify the employment relationship to one other than "at-will" for good reasons: the retention of "the best employees in the business" who had demonstrated loyalty in the aftermath of a devastating fire, the belief that an implied "for-cause" relationship with employees was an economically sounder alternative than unionized employees, and the need to prevent "skittish" employees from seeking employment elsewhere after the mass firing of other employees. Although we cannot state as a *matter of law* whether Hilton's representations actually established an implied contract, there was certainly more than enough evidence to raise a *question of fact* as to whether such an employment relationship existed.

Unfortunately, I must disagree with the majority's belief that the recently decided case, *D'Angelo v. Gardner*, 819 P.2d 206 (Nev. 1991), does not affect our analysis. In *D'Angelo*, the Nevada Supreme Court affirmed the importance of a jury's role in resolving factual questions regarding the nature of an employment contract,[2] by holding that an employee handbook, which contained provisions relating to termination for proper cause, provided sufficient evidence to submit the implied contract issue to the jury. *Id.* at 210. In the case before us, there was also evidence of Hilton's handbooks containing provisions relating to grounds for termination. *See* Tr. Ex. 62. *D'Angelo* provoked a bitter dissent decrying its impact as "strik[ing] at the validity or decency of the at-will employment doctrine" because it "virtually paves the way for a challenge to all forms of termination in Nevada based upon

[2]*See* 819 P.2d at 210 ("A jury could have concluded that both employer and employee intended to be bound by the terms of the handbook; but the jury could, of course, have concluded otherwise and decided in favor of GEMCO.").

'conditions relating to dismissal which are . . . inferable from the dealings and practices of the parties.' " *Id.* at 230 (Steffen, J., dissenting) (quoting majority opinion, *id.* at 209).

Contrary to the majority's view that *D'Angelo* "endorsed" *Vancheri*, the case also distinguishes and limits *Vancheri*. *See* Majority Opinion, at 2490. In refusing to find *Vancheri* dispositive, *D'Angelo* cites *Vancheri* as an example in which a dearth of evidence bars a jury from resolving the questions of fact usually within its realm. The *D'Angelo* dissent recognizes as much, when it complains that:

> . . . the majority's disregard of the clear doctrine recently announced by this court in *Vancheri* introduces nothing but uncertainty and confusion in the area of wrongful discharge and at-will employment. Moreover, the majority undermines this court's unanimous declaration in *Vancheri* concerning the importance of permitting employers to develop sound disciplinary procedures to caution employees . . . .

D'Angelo, 819 P.2d at 227 (Steffen, J., dissenting).

The instant case resembles *D'Angelo* more than *Vancheri*. Here, the plaintiffs marshalled equally compelling evidence as that presented in *D'Angelo*. In fact, not one, but numerous, representations assured them of termination only for cause, unlike plaintiff D'Angelo, who "received no commitments or promises regarding length or security of his employment . . . ." *D'Angelo*, 819 P.2d at 224 (Steffen, J., dissenting). This, of course, was in addition to the evidence discussed earlier regarding Hilton's written disciplinary system described in the handbooks, its established practice for providing warnings prior to terminations, and the longevity of plaintiffs' employment. In contrast, the evidence in *Vancheri* merely consisted of general expressions of job longevity and a disciplinary procedure that may not have even applied to the

plaintiff.[3] *See Vancheri*, 777 P.2d at 369. The extent of the representations made to the plaintiff was that "he would have a long and successful association with the GNLV family," *id.* at 367, and that he had "a great future" and advancement potential within the business. *Id.* at 369. These remarks are a far cry from the explicit assurances to the plaintiffs here that they would not be terminated if they performed satisfactorily and that there would be no more firings.

The majority's reliance on *Bally's*, 779 P.2d at 957, and *Smith v. Cladianos*, 752 P.2d 233 (Nev. 1988), is also misplaced. The plaintiff in *Bally's* only presented evidence regarding her subjective expectations of for-cause employment and her participation in long-term employee benefit programs, without pointing to affirmative representations of for-cause employment, as plaintiffs have done here. *Bally's*, 779 P.2d at 957-58. *Smith* involved an employee fired for alleged insubordination, who primarily relied on a handbook provision regarding probationary employees to rebut the at-will presumption. *Smith*, 752 P.2d at 234-35. Unlike the Hilton plaintiffs, at no time did she allege that the employer had represented that she would not be terminated except for cause.

This is not to say that no evidence supports the majority's suggested result that no implied contract existed. As the majority itself details, some plaintiffs were unable to recall

[3]*Vancheri* actually held that "general expressions of job longevity and advancement, and the established disciplinary procedure *as described in this case*, are not, as a matter of law, sufficient to establish a prima facie case rebutting the at-will employment presumption." *Id.* at 370 (emphasis added). This qualifier is significant, because it was unclear in *Vancheri* whether the disciplinary procedure even applied to the plaintiff, who was in a management position. *Id.* at 369. It would be inappropriate for us to construe this holding more broadly, to mean that *all* disciplinary procedures, as a matter of law, are insufficient to rebut the at-will presumption. *See, e.g., D'Angelo*, 819 P.2d at 212-13 (inclusion of detailed disciplinary procedures in employer handbook supported finding of for-cause relationship).

the specific representations which gave rise to their understanding that they would have a job as long as they performed satisfactorily. *See, e.g.*, RT XII(A) 12, 117 (Kustudia); RT XX 2-3 (Stanford); RT XXIII 153-54 (Neill). Yet the record also revealed significant evidence, in quantity and quality, to support the finding of an implied contract. *See* excerpts quoted *supra* at 2480-89. Evaluating the strength of opposing evidence is the traditional function of the jury. Here, such evidence was more than sufficient to raise a *question* whether an implied, "for-cause" relationship existed.

Because the resolution of this close issue likely turned on the inferences to be drawn from the conflicting evidence and the credibility of the witnesses, I find it particularly troubling that the majority has, in effect, usurped the jury's factfinding function in this case. It is the jury's function, not ours, to weigh conflicting evidence and judge the credibility of the witnesses. *See Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1024 (9th Cir. 1985), *cert. denied*, 474 U.S. 1059 (1986). Moreover, we must assume that the jury believed all of the evidence that was helpful to the plaintiffs and inferred favorable conclusions from the evidence. *K-Mart*, 732 P.2d at 1366. The presence of conflicting evidence does not provide grounds for us to engage in *de novo* weighing of the evidence, in order to conclude that the jury was precluded from considering the implied contract issue. If anything, such evidence underlines the critical importance of the jury's role in a case such as this and dictates that the jury verdict stand. Under the appropriate standard of review, I am convinced we should affirm the district court's conclusion that sufficient evidence existed for submission to the jury of the issue of whether the at-will presumption had been rebutted. Accordingly, I believe the jury's award for damages for breach of contract should be affirmed.

II.

Because the jury properly decided that the terminations were wrongful, I would not find, as the majority does, that the

district court erred in instructing the jury on the intentional infliction of emotional distress claim. The Nevada courts have not addressed the issue of whether a cause of action for intentional infliction of emotional distress exists in the employment termination context. *See D'Angelo*, 819 P.2d at 211, 219 n.13. This court is, therefore, free to decide what it believes the Nevada Supreme Court would hold. The absence of a specific Nevada ruling does not, as the majority states, foreclose recovery for intentional infliction of emotional distress in the employment termination context, when the Nevada courts have given no indication that such a cause of action is barred here. *See Paul v. Watchtower Bible & Tract Soc'y*, 819 F.2d 875, 879 (9th Cir.) ("Federal courts are not precluded from affording relief simply because neither the state Supreme Court nor the state legislature has enunciated a clear rule governing a particular type of controversy."), *cert. denied*, 484 U.S. 926 (1987). I believe the preferable alternative in this case is to certify the issue to the Nevada Supreme Court for its resolution. *See, e.g., In re 268 Ltd.*, 877 F.2d 804, 806 (9th Cir. 1989) (certifying to Nevada Supreme Court an unresolved issue regarding state statutory interpretation), *certified quest. answered sub nom. Joseph F. Sanson Inv. Co. v. 268 Ltd.*, 795 P.2d 493, 497 (Nev. 1990) (per curiam), *answer conformed to*, 912 F.2d 469 (9th Cir. 1990).

Although I believe that the jury's finding of an implied contract should be upheld, because I am in the minority on this issue, it would be superfluous in this dissent to reach the questions of whether there was a basis for the bad faith claim or the award of punitive damages, or to address the issues regarding ERISA preemption and the group determination of liability and damages.

Assuming, without necessarily agreeing, that punitive damages should be stricken, I concur with the majority's conclusion that liquidated damages should be awarded to the ADEA plaintiffs and that the district court did not abuse its discretion in declining to award front pay. With the exception of the ref-

erence to the punitive damages and emotional distress awards, issues on which I do not express an opinion, I also agree with the majority's disposition of the claims of plaintiffs Foltz and Delling.

III.

I am concerned that the majority has misconstrued Nevada law and overlooked important evidence clearly indicating that sufficient evidence was presented to raise a question of fact regarding the existence of an implied contract. This question was properly submitted to the jury. It is particularly in cases like these that we must remember that appellate "courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions *or because judges feel that other results are more reasonable.*" *Sanders v. Parker Drilling Co.*, 911 F.2d 191, 195-96 (9th Cir. 1990) (original emphasis) (quoting *Tennant v. Peoria & P.U. Ry. Co.*, 321 U.S. 29, 35 (1944)), *cert. denied*, 111 S.Ct. 2014 (1991). The majority, I fear, casts aside this important principle today.

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Not For Publication

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN L. BROOKS, et al.,
Plaintiff-Appellant,

vs.

HILTON CASINOS INCORPORATED, et al.,
Defendant-Appellee.

JOHN L. BROOKS,
Plaintiff-Appellee,

vs.

HILTON CASINOS INCORPORATED,
dba Las Vegas Hilton, a Nevada
Corporation, et al.,
Defendant-Appellant.

JOHN L. BROOKS, FREDERICK AMIE,
NORMAN VS. BALLARD, JACK A. BOSARGE,
ROBERT A. DAWSON, DOUGLAS S. DELLING,
ALAN KIRK DRAKE, ROGER H. DUDLEY, et al.,
Plaintiff,

and

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Intervenor-Appellant,

vs.

HILTON CASINOS INCORPORATED,
d/b/a Las Vegas Hilton, a Nevada
Corporation; Hilton Hotel Corporation,
Defendant-Appellee.

No. 90-15424
D.C. No. CV-84-0436-RDF

ORDER

No. 90-15460
No. 90-15623

FILED May 1, 1992
Cathy A. Catterson, Clerk U.S. Court of Appeals

Before: BOOCHEVER, KOZINSKI and O'SCANNLAIN, Circuit Judges.

Judges Kozinski and O'Scannlain have voted to deny the petition for rehearing, and Judge Boochever has voted to grant the petition. The full court has been advised of the suggestion for en banc rehearing and no active judge has requested a vote thereon.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

JOHN L. BROOKS, et al.,
Plaintiffs,

vs.

HILTON CASINOS, INC., et al.,
Defendants.

CV-LV-84-436-LDG

Entered November 19, 1987
Clerk, U.S. District Court
District of Nevada

Received and Filed November 18, '87
CAROL _____,
Clerk

By _____
DEPUTY

MEMORANDUM DECISION DENYING MOTION FOR SUMMARY JUDGMENT

This matter comes on before the court on defendants' motion for summary judgment on the plaintiffs' claim of intentional infliction of emotional distress resulting from defendants' conduct in terminating plaintiffs' employment. On July 17, 1987, the court heard arguments on the motion. The court has carefully considered the arguments and authorities of the parties and concludes that summary judgment should be denied.

Facts

Plaintiffs are thirty-seven former dealers and floorpersons employed beginning between 1967 and 1971 at the Las Vegas Hilton Casino, Las Vegas, Nevada. Plaintiffs worked either on the day or swing shifts in the Hilton's "21 Pit." Beginning in early 1983, the percentage won by the Hilton on gaming (the "P.C.") in the "21 Pit" on the day and swing shifts declined as compared with

gaming industry averages. This low P.C. continued through the summer of 1983.

On or about September 2, 1983, all plaintiffs were terminated from employment at the Hilton. Defendants gave plaintiffs no notice of their pending terminations. During their shifts, plaintiffs, most in small groups, were called to the office of the casino manager, and informed of their terminations. Employees on their days off were notified of their terminations by telephone. Plaintiffs were given no opportunity to appeal the termination decision. Those who tried to appeal were rebuffed.

The only reason given for plaintiffs' termination during the termination interviews and on the termination slips was a "change in personnel." A few days afer the plaintiffs' terminations, the Las Vegas Hilton Casino Manager stated in a newspaper interview that the terminations "had nothing to do with [the plaintiffs'] honesty, or integrity, there was no questions about them."

Defendants offered only limited assistance to plaintiffs in finding other employment. Plaintiffs were not given their final paychecks at the time they were terminated. Defendants withheld other monies from some plaintiffs for several months. Further, some plaintiffs were told that their medical benefits were terminated upon discharge, and were not informed of conversion rights.

On September 25, 1984, plaintiffs filed their first amended complaint, alleging among others, a cause of action for intentional infliction of emotional distress. On December 4, 1985, defendants filed a motion for summary judgment challenging the existence of a genuine issue of material fact with regard to whether defendants committed any "extreme and outrageous" conduct in terminating plaintiffs.

Analysis

This court has jurisdiction over the intentional infliction of emotional distress cause of action under the doctrine of pendent jurisdiction. *United-Mine Workers v. Gibbs*, 383 U.S. 715 (1966). The intentional infliction of emotional distress cause of action is governed by the substantive law of Nevada. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

The Nevada Supreme Court recognized the elements of the tort of intentional infliction of emotional distress to be: (1) extreme and outrageous conduct by the defendant; (2) intent to cause emotional distress or reckless disregard as to that probability; (3) severe emotional distress; and (4) actual and proximate causation of the emotional distress. *Star v. Rabello*, 97 Nev. 124, 625 P.2d 90, 91 (1981). However, the Nevada Supreme Court has not discussed the element of extreme and outrageous conduct in the termination of employment context.

It is for the court to determine, in the first instance whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery, or whether it is necessarily so. Restatement (Second) of Torts, Section 46 comment h. However, where reasonable men may differ, it is for the jury to determine whether the conduct has been sufficiently extreme and outrageous to result in liability. *Id.* On this summary judgment motion, the evidence must be viewed in the light most favorable to the non-moving parties. *Franklin v. Murphy*, 745 F.2d 1221, 1235 (9th Cir. 1984).

Plaintiffs urge this court to recognize, as have other jurisdictions, the abuse of a position of authority as the basis for intentional infliction of emotional distress in the employment context. *See Argarwal v. Johnson*, 25 Cal.3d 932, 160 Cal.Rptr. 141, 603 P.2d 58 (1979). However, this court is not convinced that Nevada courts would recognize the existence of a heightened duty in the employment relationship.

Notwithstanding such a determination, other issues of fact preclude summary judgment. Plaintiffs allege that in the gambling industry, the reason given for plaintiff's terminations — a "change in personnel" — carries the implication that the employee was discharged for some unannounced misconduct. Plaintiffs further allege that the reason given to the newspaper by the casino manager that the terminations did not involve dishonesty implicitly conveyed the opposite meaning. These actions allegedly stigmatized plaintiffs and made it difficult or impossible for them to secure other employment in the gambling industry.

Defendants argue that the terminations of plaintiffs, for whatever underlying motive, does not reach the level of extreme and outrageous conduct. *Fletcher v. Wesley Medical Center*, 585 F.Supp. 1260, 1262 (D. Kan. 1984). It is true that most claims of outrage in the employment termination context involve severe harassment, physical violence, personal invective or serious racial slurs. However, courts have also recognized that certain accusations of dishonesty or criminal behavior may be sufficiently outrageous to constitute intentional infliction of emotional distress. *Norman v. General Motors Corp.*, 628 F.Supp. 702, 704 (D. Nev. 1986) (Allegations that company initiated drug investigation of employee with knowledge that employee had not committed offense or with reckless disregard of whether he had or not sufficiently raise question of outrageousness of employer's actions.); *Argarwal v. Johnson*, 25 Cal.3d 932, 947, 160 Cal.Rptr. 141, 150, 603 P.2d 58, 66-67 (1979) (Use of racial slur, and recommendation that the employee be fired for untrue reasons constituted outrageous conduct.). *See also Salazar v. Furr's, Inc.*, 629 F.Supp. 1403, 1411 (D. N.M. 1986); *Armano v. Federal Reserve Bank of Boston*, 468 F.Supp. 674 (D. Mass. 1979); *Hall v. May Dept. Stores Co.*, 292 Or. 131, 637 P.2d 131 (1981); *Counce v. M.B.M. Co., Inc.*, 597 S.W.2d 92 (Ark. Ct. App. 1979); *Agis v. Howard Johnson*, 371 Mass. 140, 355 N.E.2d 315 (Mass. 1976); *Beavers v. Johnston*, 112 Ga.App. 677, 145 S.E.2d 776 (1965).

This court is persuaded that Nevada courts would recognize that accusations or implications of employee dishonesty or misconduct may amount to intentional infliction of emotional distress. *See generally* Annotation, *Liability of Employer, Supervisor, or Manager for Intentionally or Recklessly Causing Employee Emotional Distress*, 52 A.L.R. 4th 853, section 4 (1987). Therefore, this court holds that in view of the fact that the unexplained decline of the P.C. through plaintiffs' shifts precipitated the terminations, reasonable minds might differ as to whether defendants' actions amounted to an implication of plaintiffs' dishonesty or criminal conduct.

Finally, this is not simply the case of an employee being fired from a job. Here, plaintiffs had worked for defendants for between

two and fifteen years. They were subject to mass firings without notice and in the presence of co-workers. The terminations came during a period of concern over the casino's low P.C. Plaintiffs were given limited information on the reasons for their terminations and inadequate assistance in their post-termination status.

This court believes that Nevada courts would consider all of the surrounding circumstances in determining the outrageousness of defendants' conduct. *See Blong v. Snyder*, 361 N.W.2d 312, 318 (Iowa App. 1984) (Court considered "whole of defendant's actions" over period of time in judging outrageousness. Although *Blong* does not represent Nevada law, it is cited in support of the totality approach taken, with which the dissenting opinion in *Blong* did not disagree.). Thus, however ostensibly businesslike the individual termination interviews were, an issue of fact remains as to whether, taken together, all of the circumstances amounted to a course of conduct exceeding bounds tolerated by a decent society. Accordingly,

IT IS HEREBY ORDERED that defendants' motion for summary judgment be DENIED.

Dated: November 18, 1987.

LLOYD D. GEORGE
United States District Judge

LAS VEGAS REVIEW - JOURNAL, March 10, 1989

aming execs rap award in Hilton case

ynn says the legal system is 'completely out of whack'

ward Stutz
ill LaVelle
Journal

deral jury's multimillion-award Thursday to dealers rmen fired by the Las Ve-lton will spur a push to uch damages, said gaming y executives.

en Nugget Chairman Steve called the verdict, which d $30 million in punitive s and another $8.8 million r damages, "stupid" and legal system is "complete-of whack."

Giovenco, president of the Nevada Corp. and presi-

■ Hilton verdict gives casino workers a lift/1B

dent of the Nevada Resort Association, said the association will continue its effort already under way at the Legislature to change laws concerning punitive damages.

A bill limiting punitive damages was introduced in the Assembly on March 2.

"What this verdict shows is the legal system has to be controlled," Giovenco said. "The laws have to be changed and that's a top priority of ours."

The 37 plaintiffs — all men — were fired by the Hilton on Sept. 2, 1983. They sought findings of age and sex discrimination, breach of contract, bad-faith discharge and intentional infliction of emotional distress. Two of the men have died since the suit was filed.

Hilton lawyers and spokesmen stood by the firings, saying they were ordered in response to nine months of low wins in the resort's blackjack pit, and criticized the jury's findings as inconsistent with the evidence.

Brian Berman, a lawyer for the fired men, said the verdict will change the way employees are treated by Nevada's casino executives who for 50 years have maintained they have the right to hire and fire employees at will.

"The jury sent a clear example (to gaming industry) employers," Berman said.

But Gaming representatives said resorts no longer participate in wholesale firings.

"Those days have long since passed," Wynn said.

Giovenco said state casinos no longer terminate employees en masse.

Please see AWARD/4A

From 1A

"If it happened in the past, it doesn't happen anymore," said Giovenco, who was not at the Las Vegas Hilton in 1983.

William Lebo, Hilton Hotels Corp. general counsel, said the company will ask U.S. District Judge Roger Foley to overturn the award. Failing that, the company will appeal the verdicts to the 9th U.S. Circuit Court of Appeals in San Francisco.

"Obviously, nobody likes to have his integrity impugned, which is what's happened here," Lebo said from corporate headquarters in Beverly Hills, Calif. "Our executives have been charged with taking actions which had challengeable motives. That doesn't mean we don't feel we acted properly."

Wynn held out hope that Foley, who presided over the case, would eliminate the punitive damages.

"If these people were wrongly terminated, then I'm offended by it and they should be compensated," Wynn said. "But the entire Hilton corporation shouldn't be severely punished just because an executive makes a dumb decision."

Wynn said the federal legal system allowing large punitive awards has to be reworked.

"It's ridiculous that Hilton has to pay a figure like that. I hope it will be reduced," he said.

Mike Sloan, Circus Circus vice president, said he didn't want to comment directly on the verdict. He said the decision was one the gaming industry would closely study.

"We're very interested in the details," Sloan said. "I think (the verdict) does send out a message that we have to put a limitation on punitive damages."

Robert Ostrovsky, a vice president at Bally's, said his organization also will evaluate the verdict.

Nevada Gaming Commission Chairman John O'Reilly said state gaming agents probably will review the verdict to see if any regulatory changes might need to be made because of the decision.

If the award against the Hilton is upheld, it will have little impact on the corporation itself but could cause a drop of 50 cents per share of Hilton stock, a Wall Street analyst said Thursday.

"The company is extremely strong financially," said William Trainer, who follows Hilton stock for Merrill Lynch in New York. "This would not be an earth-shattering development in terms of their being able to handle the blow."

The Hilton Hotels Corp. has total assets of $1.9 billion and a net worth estimated at $790 million, Trainer said. He said he expects no immediate reaction on Wall Street to Thursday's verdicts.

It could take at least 18 months for the case to be resolved at the appellate level, lawyers predicted.

GAMING EXECS RAP AWARD IN HILTON CASE

Wynn says the legal system is 'completely out of whack'

By Howard Stutz
and Phil LaVelle
Review-Journal

A federal jury's multimillion-dollar award Thursday to dealers and floormen fired by the Las Vegas Hilton will spur a push to limit such damages, said gaming industry executives.

Golden Nugget Chairman Steve Wynn called the verdict, which included $30 million in punitive damages and another $8.8 million in other damages, "stupid" and said the legal system is "completely out of whack."

John Giovenco, president of the Hilton Nevada Corp. and president of the Nevada Resort Association, said the association will continue its effort already under way at the Legislature to change laws concerning punitive damages.

A bill limiting punitive damages was introduced in the Assembly on March 2.

"What this verdict shows is the legal system has to be controlled," Giovenco said. "The laws have to be changed and that's a top priority of ours."

The 37 plaintiffs — all men — were fired by the Hilton on Sept. 2, 1983. They sought findings of age and sex discrimination, breach of contract, bad-faith discharge and intentional infliction of emotional distress. Two of the men have died since the suit was filed.

Hilton lawyers and spokesmen stood by the firings, saying they were ordered in response to nine months of low wins in the resort's blackjack pit, and criticized the jury's findings as inconsistent with the evidence.

Brian Berman, a lawyer for the fired men, said the verdict will change the way employees are treated by Nevada's casino executives who for 50 years have maintained they have the right to hire and fire employees at will.

"The jury sent a clear example (to gaming industry) employers," Berman said.

But Gaming representatives said resorts no longer participate in wholesale firings.

"Those days have long since passed," Wynn said.

Giovenco said state casinos no longer terminate employees en masse.

"If it happened in the past, it doesn't happen anymore," said Giovenco, who was not at the Las Vegas Hilton in 1983.

William Lebo, Hilton Hotels Corp. general counsel, said the company will ask U.S. District Judge Roger Foley to overturn the award. Failing that, the company will appeal the verdicts to the 9th U.S. Circuit Court of Appeals in San Francisco.

"Obviously, nobody likes to have his integrity impugned, which is what's happened here," Lebo said from corporate headquarters in Beverly Hills, Calif. "Our executives have been charged with taking actions which had challengeable motives. That doesn't mean we don't feel we acted properly."

Wynn held out hope that Foley, who presided over the case, would eliminate the punitive damages.

"If these people were wrongly terminated, then I'm offended by it and they should be compensated," Wynn said. "But the entire Hilton corporation shouldn't be severely punished just because an executive makes a dumb decision."

Wynn said the federal legal system allowing large punitive awards has to be reworked.

"It's ridiculous that Hilton has to pay a figure like that. I hope it will be reduced," he said.

Mike Sloan, Circus Circus vice president, said he didn't want to comment directly on the verdict. He said the decision was one the gaming industry would closely study.

"We're very interested in the details," Sloan said. "I think (the verdict) does send out a message that we have to put a limitation on punitive damages."

Robert Ostrovsky, a vice president at Bally's, said his organization also will evaluate the verdict.

Nevada Gaming Commission Chairman John O'Reilly said state gaming agents probably will review the verdict to see if any regulatory changes might need to be made because of the decision.

If the award against the Hilton is upheld, it will have little impact on the corporation itself but could cause a drop of 50 cents per share of Hilton stock, a Wall Street analyst said Thursday.

"The company is extremely strong financially," said William Trainer, who follows Hilton stock for Merrill Lynch in New York. "This would not be an earth-shattering development in terms of their being able to handle the blow."

The Hilton Hotels Corp. has total assets of $1.9 billion and a net worth estimated at $790 million, Trainer said. He said he expects no immediate reaction on Wall Street to Thursday's verdicts.

It could take at least 18 months for the case to be resolved at the appellate level, lawyers predicted.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN L. BROOKS, et al.
Plaintiffs/Appellees/Cross-Appellants,

and

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff Intervenor/Appellee/Cross-Appellants,

vs.

HILTON CASINOS, INC., et al.
Defendants/Appellants/Cross-Appellees,

Nos. 90-15424
90-15460
90-15623

DC# CV-84-0436-RDF
Nevada (Las Vegas)

DECLARATION OF JOHN C. McCARTHY IN SUPPORT OF PLAINTIFFS' MOTION TO RECUSE PANEL MEMBERS

I, John C. McCarthy declare:

1. I am an attorney duly admitted to practice before the above-entitled court and am attorney for plaintiffs and lead counsel in the within matter.

2. I make this declaration in support of the accompanying Motion to Recuse Panel Member Judge Kozinski. The motion is based solely upon the facts in this declaration, the accompanying declarations of plaintiffs, the accompanying article, Exhibit A, from the California Lawyer, the official publication of the State Bar of California and the court file on this case. Specifically, it is not based upon any ruling or opinion of the Court or Judge Kozinski in this case (I know of no substantive rulings) or any other case or judicial opinion in which Judge Kozinski participated.

3. This case was appealed to this Court following entry of judgment on February 1, 1989, in favor of plaintiffs. All briefs on appeal were filed by November 27, 1990. Oral argument was set for February 5, 1991, in Pasadena and a panel assigned consisting of Judges Alex Kozinski, Robert Beezer and Pamela Rymer. Upon the motion of plaintiff in intervention EEOC for a continuance of oral argument based upon the emergency hospitalization of its counsel, the Court, in granting the motion, added:

"This panel will not retain jurisdiction."

The Court reset oral argument for April 2, 1991, again in Pasadena. The new panel, announced one week earlier, consisted of the Honorable Robert Boochever, the Honorable Diarmuid O'Scannlain and, again, Judge Kozinski.

4. Following oral argument I sent to my 37 clients in Nevada and elsewhere a copy of the published article on Judge Kozinski, Exhibit A, "THE AMAZING KOZINSKI: The Man Who Would Be Justice Has A Few Tricks Up His Sleeve." The Declarations of 22 plaintiffs are enclosed as Exhibit B and incorporated herein. Their Declarations state that they believe the information in the article, Exhibit A, raises in their minds the appearance of bias and prejudice by prejudgment by Judge Kozinski against them in their case which will prevent them from

obtaining a fair and impartial opinion from the judge on the appeal issues in their case. Similar declarations of other plaintiffs will be forwarded to the Court when received by me. On April 30, 1991, I sent a letter to the Honorable J. Clifford Wallace, Chief Judge of the Ninth Circuit Court of Appeal, expressing plaintiffs' concerns similar to those in this motion and enclosed a copy of Exhibit A. The Clerk of the Court responded today, Exhibit D. Exhibit C is a true copy of an article about this case and its importance as printed in the Wall Street Journal on March 10, 1989.

5. I have been informed and believe that no decision by the Court has been reached in this case and no opinion will be delivered until after the Supreme Court of Nevada has rendered its opinions on two employment cases that are pending rehearing before that Court. Oral argument on those cases is set for June 7 and 11, 1991. Following final opinions in the Nevada cases, the above Court may require further briefing and oral argument from counsel in this case.

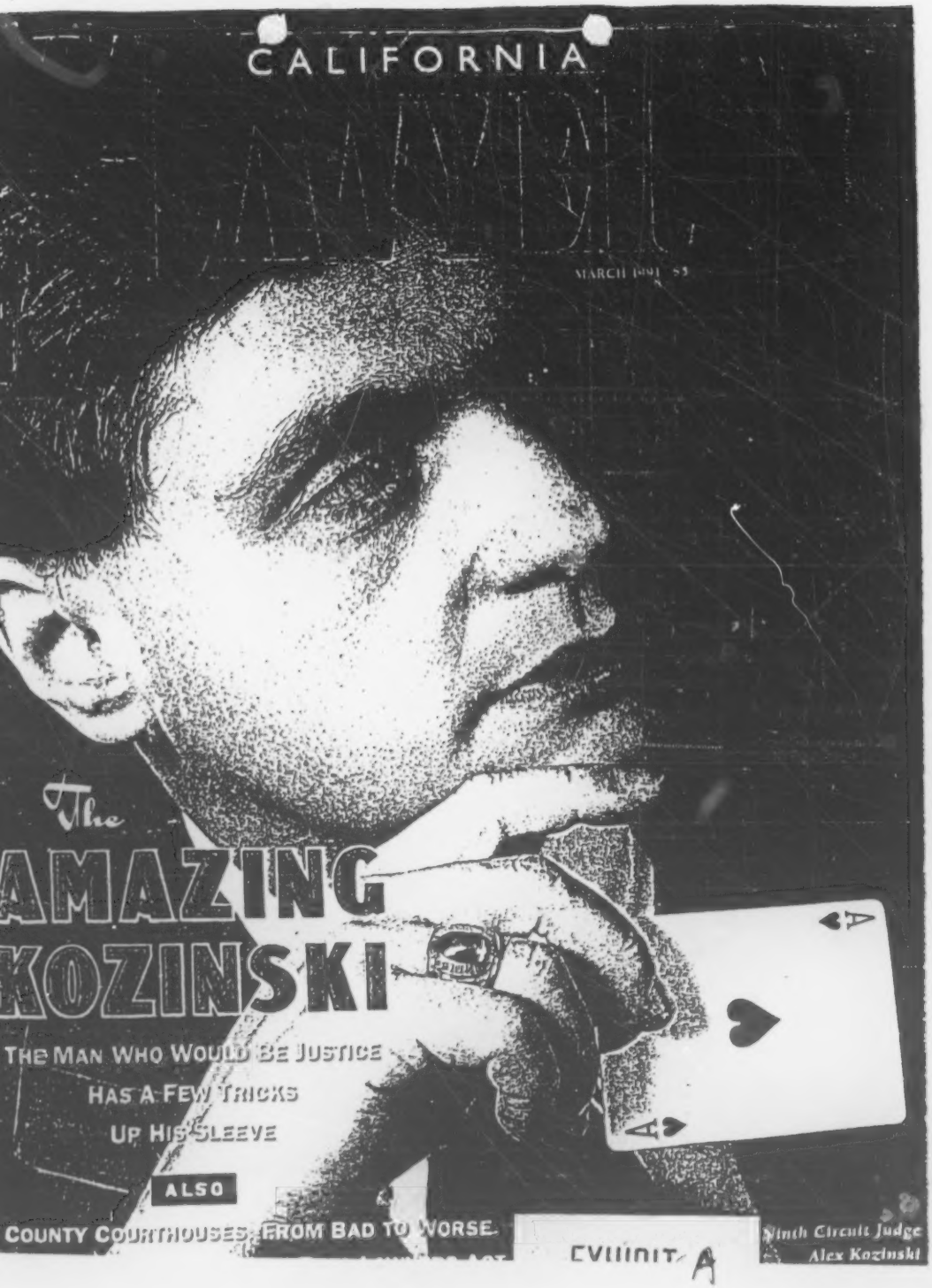
6. I am acutely aware of the sensitive nature of this motion. It is made reluctantly and only after long research, reflection and consultation with many others, both clients and colleagues and others whose judgment I respect. In my 38 years as a practicing trial attorney I have never before contemplated, least of all made, a similar motion in the Federal Courts.

Although a certificate of good faith is not required for this motion (*Simonson v. General Motors Corp.* (1976, DC PA) 425 F.Supp 574; 40 ALR Fed. 954, 961), I prefer to make one.

I am personally familiar with the facts set forth in this declaration and those in the Court records underlying this motion and believe them to be true. I further certify that the motion is based upon my good faith belief in its merits and that it is necessary to properly achieve the lawful purposes of 28 USCS § 455, a fair and impartial hearing for my clients' case. From such facts I share their impression that there is an appearance of bias and prejudice by prejudgment by Judge Kozinski against plaintiffs as employees in this employee rights case against a major industry employer.

I declare under penalty of perjury that the foregoing is true and correct this 30th day of May, 1991, in Claremont, California.

JOHN C. MCCARTHY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HAS A FEW TRICKS
UP HIS SLEEVE
ALSO
COUNTY COURTHOUSES: FROM BAD TO WORSE
EXHIBIT A
Ninth Circuit Judge
Alex Kozinski

Supreme Court, U.S.
FILED
SEP 9 1992
OFFICE OF THE CLERK

No. 92-215

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JOHN L. BROOKS, *et al.*,

Petitioners,

v.

HILTON CASINOS, INC., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the discretionary refusal of the court of appeals to certify a hypothetical point of state law at the request of litigants who opposed certification of any issue until they lost in the court of appeals and who sought certification for the first time on rehearing warrants review by the Court?

2. Whether the decision of the court of appeals of an intensely fact-bound issue of state law warrants review by the Court?

3. Whether a routine exercise by the court of appeals of its duty to ascertain and apply state law to determine whether there was sufficient evidence to send a state law claim to the jury warrants review by the Court?

4. Whether an untimely and frivolous challenge to the qualifications of a federal appellate judge that was summarily rejected by the other two members of the panel warrants review by the Court?

LIST OF PARTIES

Pursuant to Rule 29.1, respondent Hilton Casinos, Inc. is the wholly owned subsidiary of respondent Hilton Hotels Corporation.

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RESPONDENTS' BRIEF IN OPPOSITION

The Ninth Circuit's decision, and therefore this petition, begins and ends in the 167-volume trial court record and in Nevada law. This Court does not independently determine but defers to the courts of appeals on matters of state law and evidentiary sufficiency, unless it can be said that a court of appeals "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." Sup. Ct. R. 10.1(a). Nothing calling for the exercise of supervisory power is remotely involved here. The Ninth Circuit correctly determined and applied Nevada law. Petitioners' half-hearted challenge to the qualifications of the author of the opinion below, Judge Kozinski, demonstrates that, in truth, they know that this is so. The petition should be denied.

I. COUNTER-STATEMENT OF THE CASE

The Ninth Circuit's opinion, reported at 959 F.2d 757, is simpler and more straightforward than petitioners' partial account of it suggests. Petitioners dealt cards and ran casino games at the Las Vegas Hilton. They had no written contracts of employment. After they were terminated, they brought suit in federal district court.

At trial, petitioners sought damages under the ADEA and Title VII and presented three state law claims: breach of contract; bad faith discharge; and intentional infliction of emotional distress. Before oral argument in the Ninth Circuit, Hilton paid petitioners more than $3.2 million in back pay, interest, and attorney's fees on their ADEA and Title VII claims.[1] Hilton's payment rendered moot

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[1] Hilton also conceded that, were the state-law-based punitive damage award to be reversed, liquidated damages equal to the ADEA back pay award—$1.4 million—would be proper. Based on this concession, the Ninth Circuit sustained petitioners' and the EEOC's cross-appeal of the District Court's denial of liquidated damages. Pet. App., at 23-24, 959 F.2d, at 767. The correctness of the lower courts' rulings on liquidated damages is therefore not before the Court and would not be ripe unless the jury's punitive damage verdict were reinstated.

petitioners' breach of contract claims, because they supported the same back pay and interest awards as the satisfied federal claims. This left the Ninth Circuit with petitioners' alternative claims to tort damages for bad faith discharge and intentional infliction of emotional distress.[2]

As the majority correctly observed, Pet. App., at 6, 959 F.2d, at 759, Nevada law presumes employment to be at will in the absence of a written contract. *Vancheri* v. *GNLV Corp.*, 777 P.2d 366, 368 (Nev. 1989). To overcome this presumption, an employee must prove "either an express or an implied contract that she would only be terminated for just cause." *Bally's Grand Employees' Federal Credit Union* v. *Wallen*, 779 P.2d 956, 957 (Nev. 1989).

In matters of contract, Nevada follows the common law. An implied contract, equally with an express contract, requires an "ascertainable agreement." *Smith* v. *Recrion Corp.*, 541 P.2d 663, 665 (Nev. 1975). A party does not have a contract merely because he expects the other to perform; the other must by his words or conduct have shown he promised to perform. *Warrington* v. *Empey*, 590 P.2d 1162 (Nev. 1975). In Nevada,

> the making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs,—not on the parties' having *meant* the same thing but on their having *said* the same thing.

Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 464 (1897) (emphasis in original), *quoted with approval in Hotel Riviera, Inc.* v. *Torres*, 632 P.2d 1155, 1157 (Nev. 1981), and in the opinion below, Pet. App., at 18, 959 F.2d, at 764.

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[2] Petitioners' bad faith discharge and intentional infliction claims rest on identical facts and support identical damages. As petitioners candidly admitted to the trial court, the "only reason" they pleaded intentional infliction of emotional distress was to provide "alternate theories to get to the same damages" should their bad faith discharge claims be disallowed. RT XXXVIII 58-59.

Here, the Ninth Circuit faithfully followed Nevada law. It stated the applicable presumption, canvassed the record, and identified the facts offered to rebut the presumption:

> Plaintiffs were not employed under a written employment contract. Under Nevada law, the absence of a written contract gives rise to the presumption that employment is at will. *See Vancheri v. GNLV Corp.*, 105 Nev. 417, 777 P.2d 366, 368 (1989) (per curiam). Plaintiffs had the burden of rebutting this presumption by establishing that they were employed under a contract terminable only for just cause. Plaintiffs' evidence fell into four broad categories: (1) plaintiffs' longstanding satisfactory employment with Hilton; (2) inducements extended by Hilton to retain plaintiffs, including employee benefits and a retirement plan that were among the best in the industry; (3) a progressive disciplinary system, and a past practice of terminating employees only in accordance with this system; and (4) assurances and representations by Hilton's management that plaintiffs were part of the "Hilton family" and would have their jobs as long as they performed them satisfactorily.

Pet. App., at 6-7, 959 F.2d, at 759-60.

The Nevada Supreme Court has applied the at-will presumption nine times over the last ten years. Its cases teach that Nevada employers do not give up the at-will presumption based on factors as ubiquitous and inconsequential as those petitioners identified here. *See* Pet. App., at 8 n.2, 959 F.2d, at 760 n.2 (observing that no Nevada case supports petitioners' argument that longevity creates an implied contract of continued employment); *Vancheri*, 777 P.2d, at 369-70 (neither does calling an employee "part of the family" and establishing and following a progressive discipline system); *Bally's Grand*, 779 P.2d, at 958 n.2 (similar to *Vancheri*, except that in *Bally's Grand* the supervisor also testified that his policy was not to terminate

employees "except for some failure to perform");[3] *Smith* v. *Cladianos*, 752 P.2d 233, 235 (Nev. 1988) (Nevada employers who distribute handbooks listing employment do's and don'ts do not lose the presumptive legal right to hire and fire at will); *Sands Regent* v. *Valgardson*, 777 P.2d 898, 899 (1989) (to like effect as *Smith*).[4]

Based on this body of Nevada law and its careful review and explication of the massive record before it, the majority correctly concluded that "the evidence presented was insufficient as a matter of Nevada law to create an implied contract [of continued employment] and thus never should have been submitted to the jury." Pet. App., at 20, 959 F.2d, at 765.

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[3] Citing Vol. IX, pages 100 & 109 of the trial transcript, petitioners misrepresent that there was an "undisputed admission from Hilton's own CEO and chairman of the board that the employer [Hilton] itself, at the time petitioners were hired, understood and agreed that the relationship was *not* one in which the employees could be terminated without a 'just and fair reason.' " Pet., at 11-12 (emphasis in original). The testimony cited refers to Barron Hilton's personal practice, as followed by him in terminating former Notre Dame coach Frank Leahy as general manager of the San Diego Chargers, and does not speak to any agreement or understanding Hilton may have had with petitioners the time they were hired. Even if it did, moreover, *Bally's Grand* holds this kind of normal reluctance to engage in periodic, random firings—merely to be sure the at-will presumption remains intact—to be without promissory or contractual significance in Nevada.

[4] Other Nevada at-will cases include: *Beales* v. *Hillhaven, Inc.*, 825 P.2d 212 (Nev. 1992); *D'Angelo* v. *Gardner*, 819 P.2d 206 (Nev. 1991); *American Bank Stationery* v. *Farmer*, 799 P.2d 1100 (Nev. 1990); *Stone* v. *Mission Bay Mortgage Co.*, 672 P.2d 629 (Nev. 1983); *Southwest Gas Corp.* v. *Ahmad*, 668 P.2d 261 (Nev. 1983). Unlike those cited in the text, these cases involved elements of an *express* contract, *i.e.*, a contract based on definite written or spoken promises, not one said to be *implied* from the parties' conduct. *K Mart Corp.* v. *Ponsock*, 732 P.2d 1364 (Nev. 1987), does not address the at-will presumption, although the dissenting opinion of Judge Boochever discusses the case as if it did. Pet. App., at 29, 959 F.2d, at 775. The employer in *K Mart* stipulated that the employee could not be terminated except for the reasons and according to the procedures stated in its handbook. 732 P.2d, at 1366 n.1. In this case, the parties stipulated that petitioners were *not* terminated for handbook violations. CR 432, Inst. 26 ¶¶ 9 & 10.

In Nevada, as in most States, tort liability does not attach to the act of terminating an at-will employee absent an independent offense to public policy. *See, e.g., Wiltsie* v. *Baby Grand Corp.*, 774 P.2d 394 (Nev. 1984). In this case, petitioners pursued no public policy tort, Pet. App., at 20-21 n.6, 959 F.2d, at 765 n.6. Thus, petitioners' status as at-will or not-at-will employees stood as the threshold test for both of their alternative tort claims.[5] As the Ninth Circuit consequently held, unless petitioners overcame the at-will presumption, neither their bad faith discharge nor intentional infliction claims could stand:

> Because plaintiffs were employed at will, Hilton was entitled to discharge them at will. They cannot maintain a cause of action under Nevada law for . . . bad faith discharge. . . .
>
> [For the same reason] their discharge did not amount to the type of willful misconduct that could serve as a predicate for the tort of intentional infliction of emotional distress. *See Alford v. Harold's Club*, 669 P.2d 721 (Nev. 1983) (upholding dismissal of plaintiffs' claims for intentional infliction of emotional distress arising from their terminations for refusal to comply with a tip pooling policy, because the tip pooling policy was legal and hence their terminations could not be wrongful).

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[5] Even if petitioners could overcome the threshold test of proving their employment was not-at-will, moreover, it is by no means clear that Nevada will allow a not-at-will employee to pursue tort as distinct from contract damages for a termination that stops short of violating declared public policy which, under *Wiltsie* v. *Baby Grand Corp., supra*, petitioners are not in a position to prove. *Compre K Mart Corp.* v. *Ponsock, supra, with Marcoz* v. *Summa Corp.*, 801 P.2d 1346 (Nev. 1990) (viability of bad faith discharge claim by not-at-will employee uncertain where ERISA preemption is raised to preclude special reliance on pension benefits). *Cf. Falline* v. *GNLV Corp.*, 828 P.2d 888, 894 (Nev. 1991) (declining to recognize intentional infliction claim in context of improper denial of workers' compensation benefits because doing so "raises the spectre of almost every emotion-based case turning up as some kind of tort suit") (citation omitted).

Pet. App., at 21, 959 F.2d, at 765-66 (citations omitted). There is no disagreement between the majority and the dissent on this point. *See* Pet. App., at 46-47, 959 F.2d, at 777 ("[b]ecause [I believe] the jury properly decided the terminations were wrongful, I would not find, as the majority does, that the district court erred in instructing the jury on . . . intentional infliction of emotional distress") (Boochever, J., dissenting).

The key to the Ninth Circuit's decision is the at-will presumption and whether, as a matter of Nevada law, petitioners overcame it.[6] The majority held that they did not. The dissent would hold that they did. Petitioners obfuscate this crucial point by discussing their intentional infliction claims as if they existed separate and apart from their contract claims when in fact the latter remain in the case only as an element of the former.

The petition also misrepresents a number of stated facts. A prime example is the statement on page 3 of the petition

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[6] Here, as in the Ninth Circuit, petitioners argue Hilton did more than just terminate them. The additional "acts" claimed to give rise to tort liability consist of (1) Hilton's refusal to explain the terminations except as a "change of personnel"; (2) the company's statement to the press, when asked, that cheating was not involved; and (3) its testimony about the low PC after being haled into court and required to explain its reasons for the terminations. No member of the panel, including Judge Boochever, credited these fall-back arguments. The Nevada Supreme Court has authorized casinos to refuse to explain employee terminations except in general terms whether or not, and perhaps especially when, widespread cheating is suspected. *Moen* v. *Las Vegas Int'l Hotel, Inc.*, 521 P.2d 370, 371 (Nev. 1974). Hilton's statements in response to questions from the press and in court are privileged and not actionable in tort, whether as intentional infliction or under some other label. *The Florida Star* v. *B.J.F.*, 491 U.S. 524, 540-41 (1989); *Knox* v. *Dick*, 665 P.2d 267 (Nev. 1983). Petitioners effectively conceded below at least the second and third points. *See* Opening Brief of Brooks, *et. al.*, in the Ninth Circuit (hereafter "Petrs. Op. Br."), at 33 ("plaintiffs' [intentional infliction] claim is not based upon the casino manager's statement to a newspaper after plaintiffs' terminations to the effect that plaintiffs' honesty and integrity were unquestioned. Nor is it premised upon the [casino manager's] sworn testimony . . . during and at trial that plaintiffs could have been involved in cheating.")

that "[t]he jury . . . found that Hilton's management had used the dismissals as a cover-up for an embezzlement scam by management that was costing Hilton millions of dollars." Petitioners argued this theory, among others, but nowhere in the 177 separate verdict forms and special interrogatories was such a finding made and, indeed, the evidence of record was to the contrary.[7]

Petitioners sought rehearing and rehearing *en banc* in the Ninth Circuit. Thirty-six days after their petition was filed, it was denied, with no active judge voting to hear the case *en banc*.

II. NONE OF THE FOUR QUESTIONS PRESENTED MERITS REVIEW BY THIS COURT

A. There Is No Dispositive Issue of State Law That the Ninth Circuit Failed To Answer or Should Have Certified

Question 1 is premised on the erroneous assertion that, in deciding this case, the Ninth Circuit was required but refused to decide whether the Nevada Supreme Court

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[7] Petitioners give no record cites—nor could they—to the jury's "finding" of a management fill scam. The citations they gave below to support their "management fill scam" theory were to *stricken* testimony and "expert" testimony later shown to be based on incomplete facts and a statistical approach even petitioners' statistician said was flawed. *See* Petrs. Op. Br., at 7 n.6 (citing RT X 157-68, which testimony the District Court struck as impermissibly speculative, RT XI(A) 78-79, and RT XV 75-76, 87, 113-16, which opinion testimony was discredited as statistically faulty, RT XXII 13-15 and XL 118, and based upon incomplete facts, *compare* RT XVI 62-64 (absence of evidence of Hilton's adoption of certain measures carried significant weight with petitioners expert) *with* RT XLT 150-51 (the measures were undertaken, petitioners simply did not ask Hilton or tell their expert about them, *see* RT XVI 64-65 and 102)).

Other misrepresentations include but are not limited to petitioners' attribution to Barron Hilton of an "undisputed admission," *see* note 3, *supra*, and the federalism concerns they try to raise, Pet., at 4-5. Neither the record nor the facts support petitioners' unstated but apparent claim that the Nevada legislature and/or Nevada Supreme Court has passed on, much less validated, the trial court's judgment in this case.

would recognize the tort of intentional infliction of emotional distress in the not-at-will employment termination context. Because the Ninth Circuit concluded that petitioners were employed at will, it was not required to discuss, let alone resolve, that open issue of Nevada law. Therefore, the question presented by petitioners is hypothetical—constituting an attack on *dictum*—and would not warrant review even if other federal courts of appeals differed from the majority in their approach to resolving similar undecided issues of state law—which they do not,[8] and even if petitioners were otherwise entitled to the relief they actually seek from this Court, certification—which they are not.

1. Question 1 Is Hypothetical

As discussed above, all three members of the panel interpreted Nevada law to preclude an action for intentional infliction of emotional distress where the discharged employee was an at-will employee. The majority and dissent also agreed that the Nevada courts, in the dissent's words, "have not addressed the issue of whether a cause of action for intentional infliction of emotional distress exists in the [wrongful] employment termination context." Pet. App., at 47, 959 F.2d, at 777 (Boochever, J., dissenting). As the majority observed, the Nevada Supreme Court only recently declined to address that question. Pet. App., at 22, 959 F.2d, at 766 (citing *D'Angelo* v. *Gardner*, 819 P.2d 206, 211, 219 n.13 (Nev. 1991)).

The difference between the majority and dissent arises from their contrary answers to the question whether petitioners were, as a matter of Nevada law, at-will employees. By answering that question in the affirmative, the majority was not required, in disposing of the case, to determine the status of Nevada law respecting intentional infliction in the not-at-will context. The majority itself ex-

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[8] As discussed in note 11, *infra*, two other federal courts of appeals faced with similar claims by diversity plaintiffs have refused to extend the applicable State's law to recognize intentional infliction claims in the employment termination context.

pressly recognized that its discussion of the intentional infliction issue in the not-at-will context was unnecessary, prefacing that discussion with the statement, "[e]ven had [petitioners] managed to establish that the terminations were wrongful . . . ." Pet. App., at 22, 959 F.2d, at 766. That part of the Ninth Circuit's *opinion* challenged in Question 1 is thus hypothetical *dictum*. This Court does not sit to review abstract, hypothetical questions whose resolution would be irrelevant to the ultimate disposition of the case. *See Sommerville* v. *United States*, 376 U.S. 909 (1964), as discussed in R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 201 (6th ed. 1986).

Petitioners deliberately elide the critical distinction between at-will and not-at-will employees because, in order to avoid the hypothetical nature of their primary question, they would have to persuade the Court to grant review of the at-will issue. But this Court would have no reason to expend its resources to review the 71-volume transcript of a 55-day trial for the sole purpose of second-guessing the determination by a court of appeals of an intensely fact-bound issue of state law, in this case whether the evidence was sufficient to overcome the presumption of at-will employment and to send the at-will issue to the jury.

Petitioners themselves state that this Court "does not ordinarily grant certiorari to correct errors of state law," Pet., at 16. Petitioners' acknowledgment that this Court would not "ordinarily" undertake such a task is considerably understated. As the Court has on numerous occasions made clear, the Court defers to interpretations of state law by the lower federal courts. *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 499-500 (1985). One reason for the Court's deference is to conserve its own resources; thus, it defers in order to "render unnecessary [its] review" of such state law issues. *Cort* v. *Ash*, 422 U.S. 66, 73 n.6 (1975). This prudential rule is grounded in part in the reality that because this Court (and the lower federal courts) is not the final expositor of the substantive content of the law of any State, its decision on a point of state

law would have no significant impact beyond the litigants before it.

This case resulted in briefs filed in the Ninth Circuit totalling more than 440 pages. It was argued to the panel for almost two hours. Some eight months after oral argument of this case, the panel invited the parties to submit supplemental briefs addressing whether, under the then-recent decision of the Nevada Supreme Court in *D'Angelo* v. *Gardner*, *supra*, petitioners should be presumed to be at-will employees and whether the case properly went to the jury on that question. The majority opinion exhibits a careful and extensive consideration of the briefs and the record. It is difficult to comprehend why this Court would expend its scarce resources and, sitting as a court of error, reexamine the majority's conclusion on the at-will issue. Thus, petitioners' request that the Court grant certiorari to review Question 1 suffers from a fatal flaw because that question, standing alone, is abstract and hypothetical.

2. Question 1 Would Not Warrant Review Even If It Were Not Derived from *Dictum*

Question 1 is also fatally flawed in other respects. Under one reading of the petition, petitioners appear to seek the adoption by this Court of a rule that federal courts confronted with a request to take state law into uncharted waters are, in the dissenting judge's term,[9] "free" to *create*, by the stroke of the federal judicial pen, important state policy. In this case, that policy would, if enacted by the federal courts, substantially affect the fundamental relationships between employers and employees in Nevada.

The majority canvassed the state of the law in Nevada and other jurisdictions, correctly concluded that Nevada law does not currently recognize a right of action for in-

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[9] Pet. App., at 47, 959 F.2d, at 777. The case relied upon by the dissent, *Paul* v. *Watchtower Bible & Tract Society*, 819 F.2d 875 (9th Cir.), *cert. denied*, 484 U.S. 926 (1987), is not even cited by petitioners in support of their appeal to principles of federalism, nor should it have been since the portion of the Paul opinion cited is pure *dictum*.

tentional infliction in the employment termination context, and declined to declare that such a right of action existed as a matter of Nevada law. The majority below did not, however—as suggested by petitioners, Pet., at 6 (the majority adopted "a new doctrine of judgment by default")—deny that it had the *authority* to take the extraordinary step of creating such a right of action. Rather, the majority stated, in addressing this issue as *dictum*, that it would not take unto itself the task of creating such significant Nevada policy *because* it had no guidance from the Nevada Supreme Court[10] and *because* the wisdom of adopting such a policy was "open elsewhere."[11]

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[10] Petitioners, Pet., at 7, cite two Nevada federal cases as recognizing an action for intentional infliction and complain that the court below "considered none of these district court judgments." In fact, neither the majority nor the dissent cited either of those two cases, *Wolber* v. *Service Corp. Int'l*, 612 F. Supp. 235 (D. Nev. 1985) and *Norman* v. *General Motors Corp.*, 1 IER Cases, 1221, 1222 (D. Nev. 1986), because neither case supports petitioners' position. The doctrinal basis for *Wolber* was repudiated in *Sands Regent* v. *Valgardson*, 777 P.2d, at 899-900, while *Norman*'s "abuse of power" rationale was expressly rejected by the District Court in this case, Pet. App., at 53, and that case is otherwise factually distinguishable.

[11] The majority, Pet. App., at 22 n.8, 959 F.2d, at 766 n.8, cited *Lanouette* v. *Ciba-Geigy Corp.*, 272 Cal. Rptr. 428 (Ct. App. 1990), for that proposition, a case that had been relied upon by petitioners in their principal brief in the Ninth Circuit. At that time, *Lanouette* was *sub judice* in the California Supreme Court, which on July 9, 1992 transferred *Lanouette* to the Court of Appeal, 2 Cal. 4th No. 21, at 2 (Dispositions) (1992), for reconsideration in light of its May 18, 1992 decision in *Livitsanos* v. *Superior Court*, 828 P.2d 808 (Cal. 1992). *Livitsanos* held that no cause of action for intentional infliction in the employment context existed in California because preempted by California's workers' compensation statute. In so holding, that court expressly recognized that because the workers' compensation statute did not itself provide for compensation for emotional distress in some circumstances, some employees would have no remedy at all for emotional distress: "Not every aggravation in normal employment life is compensable." *Id.*, at 816. *Livitsanos* casts considerable doubt on petitioners' reliance, Pet., at 7 n.1, on other prior California appellate decisions as establishing in California a common law right of action for intentional infliction in the employment termination context. Other cases relied on by petitioners in that same footnote are equally suspect as support for

It is evident, therefore, that the most the majority's opinion can be read for is that the majority applied existing Nevada law, but declined to exercise gratuitously whatever discretion it might have to create important Nevada policy.[12] To be sure, petitioners disagree with the Ninth Cir-

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the proposition for which they are cited. *See, e.g., Patton* v. *J.C. Penney Co.*, 719 P.2d 854, 858 (Or. 1986) (explaining that court's prior decision in *Hall* v. *May Department Stores Co.*, 637 P.2d 126, 131 (Or. 1981)—cited in petitioners' footnote 2—as involving "deliberate[] use [of] psychic distress in an attempt to coerce an employer into admitting a crime").

As other federal courts have recognized, a right at common law for employees to sue for intentional infliction of emotional distress in the employment termination context does not exist in a number of jurisdictions. *See Beck* v. *Interstate Brands Corp.*, 953 F.2d 1275, 1276 (11th Cir. 1992) (per curiam) (Georgia); *Cox* v. *Keystone Carbon Co.*, 861 F.2d 390, 395 (3d Cir. 1988) (Pennsylvania), *cert. denied*, 111 S. Ct. 47 (1990); *London* v. *Hayek*, 756 F. Supp. 107, 109 (S.D.N.Y. 1989) (South Carolina); *Fletcher* v. *Wesley Medical Center*, 585 F. Supp. 1260, 1262 (D. Kan. 1984) (Kansas). These federal cases illustrate a reluctance among the federal courts of appeals (and district courts) to create or extend state law in this sensitive area. None of those courts thought it useful to certify the matter to the pertinent state courts (only Pennsylvania has no certification procedure).

[12] Petitioners claim that the refusal of the court of appeals to *make* important Nevada policy constitutes "inaction" in violation of the Court's decisions in *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), and *Salve Regina College* v. *Russell*, 111 S. Ct. 1217 (1991). As for *Erie*, it is absurd to suggest that a case that withdrew from the federal courts the authority to displace substantive state policy through the adoption of conflicting "general" law or federal common law can be read as petitioners do. In addition, this Court does not exercise its discretionary jurisdiction to police adherence by the federal courts of appeals to *Erie*. *See Haring* v. *Prosise*, 462 U.S. 306, 314 n.8 (1983). As for *Salve Regina*, it suffices to point out that petitioners' reliance, Pet., at 8 & n.2, on the District Court's opinion declining to dismiss pre-trial their intentional infliction claim confirms the wisdom of *Salve Regina*'s holding that determinations of state law are to be reviewed *de novo* by the federal courts of appeals. As a cursory review of the District Court's opinion, Pet. App., at 54, reveals, the District Court left the intentional infliction claim in this case without citing so much as a single decision rendered at any level of Nevada's state court system. Our federalism respects the right of the citizens of each State to place in the hands of state judges the authority to make important social policy under the guise of the common law. Our federalism does not, however, require

cuit's refusal to create new Nevada law, but the Ninth Circuit's exercise of discretion not to create new Nevada law surely presents no important issue of federal law. Petitioners are, at bottom, asking this Court on the merits to predict that the Nevada Supreme Court would recognize such a right of action on the basis of nothing more than that several other States have arguably, *but see* note 11, *supra*, recognized such a right of action. It is not, however, the role of this Court to second-guess such predictions by the courts of appeals that affect only the rights and obligations of the litigants before them.[13]

Shrinking from the evident and far-reaching implications of the notion that federal courts are "free" to create important state policy out of whole cloth, the dissenting judge below concluded, *sua sponte*, that "the preferable alternative" would be to certify this policy issue to the Nevada Supreme Court. Pet. App., at 47, 959 F.2d, at 777. Petitioners, for their part, conclude their discussion of Question 1 with the plea that, "[m]inimally, this Court should vacate the judgment below with instructions . . . [to] certify the issues of state law to the Nevada Supreme Court." Pet., at 9.

Petitioners do not appear to seek adoption of a rule under which federal courts would be *required* to certify issues of state law under the circumstances of this case. Any such rule would have no basis in law and would be contrary to this Court's emphasis on the discretionary na-

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federal judges to engage in such a lawmaking function when plaintiffs voluntarily seek relief in federal courts on novel state law claims.

[13] Nor is Question 1 "important" for purposes of the Court's exercise of its certiorari jurisdiction. The concept of importance does not include the importance of resolution of a question to just the litigants before the Court. *See, e.g., Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 79 (1955). Petitioners point to no other federal litigants in the Ninth Circuit who might be adversely affected by this decision. Thus, this case presents no questions of importance to anyone but petitioners, who have already collected more than $3 million from Hilton on their federal statutory claims and stand to collect another $1.4 million on their ADEA claims upon denial of this petition.

ture of the certification authority. *See, e.g., Lehman Brothers* v. *Schein*, 416 U.S. 386, 391 (1974) (the use of certification "in a given case rests in the sound discretion of the federal court"). Thus, it appears that petitioners in actuality urge the Court to grant review of Question 1 to do nothing more than enter an order directing certification by the Ninth Circuit of what petitioners vaguely describe as "the issues of state law." Such an action would not only be an unprecedented exercise of this Court's certiorari jurisdiction but would be, as discussed next, totally inappropriate on the merits.

3. Certification of Any State Law Issues Would Be Totally Inappropriate

As discussed above, the question whether the Nevada Supreme Court would recognize the intentional infliction tort in the not-at-will employment termination context is, in this case, hypothetical. Thus, any rational certification would either have to be preceded by a redetermination of the at-will issue (reversing the Ninth Circuit's determination) or would have to be expanded to include the at-will issue. If precedent exists for such a bizarre certification, Hilton has not been able to find it; indeed, the precedent is to the contrary.[14] Petitioners' limited request, if expanded to include the at-will issue, would be little else than a request to transfer a considerable portion of a case they have now lost to the Nevada state court system even though they voluntarily brought their highly speculative

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[14] As observed in part I. above, there is an abundance of Nevada law on the at-will presumption, all made by the Nevada Supreme Court (Nevada has no intermediate appellate court). "Where the applicable state law is clear, certification is inappropriate; [certification] is not a procedure by which federal courts may abdicate their responsibility to decide a legal issue when the relevant sources of state law . . . provide a discernible path . . . ." *Tidler* v. *Eli Lilly and Co.*, 851 F.2d 418, 426 (D.C. Cir. 1988). Thus, the only at-will issue remaining for possible certification would be the *application* of discernible Nevada law to the voluminous record in this case. Petitioners do not request certification of that issue in the petition.

intentional infliction claims in federal court when they could have brought those claims in state court.[15]

Petitioners' post-eleventh-hour plea for certification suffers from other fundamental defects. Petitioners disingenuously represent to the Court that they "requested certification in the[ir] Petition for Rehearing." Pet., at 9 n.3. They do not, however, disclose to the Court that that request at the rehearing stage represented a complete reversal of the position they expressly took on certification in the Ninth Circuit before that court ruled against them. In their principal brief in the Ninth Circuit, the pertinent pages of which are reprinted in the Appendix hereto, petitioners affirmatively opposed certification of *any* issue in this case.[16]

In the Ninth Circuit, the black-letter law is that "particularly compelling reasons" must be present where certification is sought for the first time on appeal "by a movant who lost on the issue below." As the Ninth Circuit put the matter, "[o]rdinarily such a movant should not be allowed a second chance at victory." *In re McLinn*, 744

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[15] The federal courts of appeals are in general agreement "that one who chooses the federal courts in diversity actions is in a particularly poor position to seek certification." *Cantwell* v. *University of Massachusetts*, 551 F.2d 879, 880 (1st Cir. 1977). *See, e.g., Seaboard Surety Co.* v. *Garrison, Webb & Stanaland, P.A.*, 823 F.2d 434, 438 (11th Cir. 1987); *Colonial Park Country Club* v. *Joan of Arc*, 746 F.2d 1425, 1429 (10th Cir. 1984); *Smith* v. *FCX, Inc.*, 744 F.2d 1378, 1379 (4th Cir. 1984), *cert. denied*, 471 U.S. 1103 (1985).

[16] In their opening brief in the Ninth Circuit, at pp. 42-43 & n.61, reprinted *infra*, App., at 2a, petitioners opposed certification of the question whether a Nevada statute not at issue in this Court preempted their intentional infliction claim, stating that the District Court "had substantial relevant authority, from Nevada and elsewhere, to rely upon for guidance" in deciding that question. In footnote 61 appended to the foregoing quote, petitioners asserted, emphasis added, that "[t]he same is true" with regard to their intentional infliction claims. Petitioners then concluded in the text of their brief that "certification of this [the statutory preemption issue] *or any other issue* is unwarranted."

F.2d 677, 681 (9th Cir. 1984). *See also Louie* v. *United States*, 776 F.2d 819 (9th Cir. 1985).

Petitioners concluded that they were going to prevail in the Ninth Circuit and they were wrong. The refusal of a single Ninth Circuit judge to respond to their certification plea in their suggestion for rehearing *en banc* is consistent with the reception that plea had to receive under *McLinn* and would have received in other courts of appeals. *Cf. Fischer* v. *Bar Harbor Banking and Trust Co.*, 857 F.2d 4, 7 (1st Cir. 1988) (certification "particularly inappropriate" where plaintiff sought certification for the first time on appeal and plaintiff voluntarily chose to bring state law claims in federal court), *cert. denied*, 489 U.S. 1018 (1989). As the Eighth Circuit put the matter in *Perkins* v. *Clark Equipment Co.*, 823 F.2d 207, 210 (8th Cir. 1987), "[t]he practice of requesting certification after an adverse judgment has been entered should be discouraged. Otherwise, the initial federal decision will be nothing but a gamble with certification sought only after an adverse decision." *Accord Chrysler Credit Corp.* v. *Louis Joliet Bank & Trust Co.*, 863 F.2d 534, 540-41 (7th Cir. 1988); *Armijo* v. *Ex Cam, Inc.*, 843 F.2d 406, 407 (10th Cir. 1988).

A fortiori these rules should apply where, as here, certification is sought not simply for the first time on appeal, but on rehearing in the court of appeals and, thence, in this Court, by a litigant who previously opposed certification. There is certainly no warrant for this Court to exercise its discretionary jurisdiction to facilitate such gambling by litigants. Indeed, were this Court ever to do so, it would predictably be flooded with petitions from disappointed litigants who had rolled the dice in the courts of appeals and lost.[17]

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[17] Because the only issue petitioners sought to have certified on rehearing was the hypothetical question whether Nevada would recognize the intentional infliction tort in the not-at-will context, their plea in this Court for certification of what they characterize as "the issues of state law" comes doubly late as to any issue on which certification was not sought below.

Even if petitioners had sought (rather than opposed) certification before they lost below, moreover, it is doubtful whether the vaguely articulated "issues" upon which they now seek certification would have been suitable for certification. Certification is inappropriate where "the issue sought to be certified is only one of many involved in the litigation." *In re McLinn*, 744 F.2d, at 681. Indeed, under Nevada's certification rule, the question certified must be "determinative" of the case. Rule 5, Nev. R. App. P. In this case, the barriers to petitioners' recovery of any tort damages on their state law claims are multiple and formidable and certification of the sole question posed by petitioners on rehearing below and in the petition would not be "determinative" of anything.[18]

Based on the foregoing facts and decisions, it is evident that petitioners' assertion, Pet., at 9, that the refusal of the Ninth Circuit on rehearing to overlook petitioners' reversal of position on certification and accept their belated invitation to certify a hypothetical question constituted an "abuse of discretion" is baseless even if this Court ex-

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[18] Because of the way the majority resolved the at-will issue, it did not "discuss the [other state law,] federal and constitutional issues raised by Hilton in its appeal." Pet. App., at 6, 959 F.2d, at 759. Those issues include, *inter alia*, Hilton's challenge, on ERISA preemption grounds, *see Ingersoll-Rand Corp.* v. *McClendon*, 111 S. Ct. 478 (1990), to the trial judge's submission of the state law claims to the jury; its challenge, on federal due process grounds, to the retroactive imposition of at least $30 million in punishment for acts lawful when undertaken; its challenge to petitioners' proof of the other elements of the bad faith discharge and intentional infliction torts, especially the existence of a required "special relationship" between Hilton and its employees in a non-ERISA setting, *see* note 5, *supra;* whether, under *D'Angelo*, 819 P.2d, at 209 n.4, the disclaimers contained in Hilton's ERISA plan and other handbooks precluded petitioners' claim to not-at-will status as a matter of law; and whether the group proof of liability and damages violated Nevada law and the Seventh Amendment. Each of these issues (and others) would have to be addressed and resolved adversely to Hilton before the judgment of the court of appeals would be affected by the certification sought by petitioners even if the Nevada Supreme Court hypothetically recognized on certification the right of action asserted by petitioners.

pended its resources to supervise the exercise of that highly discretionary authority by the courts of appeals—which it does not. Indeed, had the Ninth Circuit ordered certification of that hypothetical question at petitioners' request at the rehearing stage, its decision to do would have been contrary to Ninth Circuit cases such as *McLinn* and itself an abuse of discretion. Question 1 does not warrant review.

B. Questions 2 and 3 Involve Issues of Evidentiary Sufficiency and Pure State Law That Do not Warrant the Exercise of Certiorari Jurisdiction

As discussed in part II.A.1. above, this Court does not expend its resources in second-guessing decisions of the courts of appeals that turn on the resolution of questions of state law, including the question of the sufficiency of the evidence to send an issue of state law to the jury. Petitioners, in order to circumvent the Court's practice in this regard, dress what is at bottom nothing more than a sufficiency-of-the-evidence claim in Seventh Amendment and *Erie* clothing. Such dress, however, does not convert their claim into one meriting this Court's review.

1. The Majority's Determination That Petitioners Failed To Present Evidence of a Type the Nevada Supreme Court Would Hold Sufficient To Rebut the Presumption Their Employment Was At Will Is Correct and Unexceptionable

Absent a "very obvious and exceptional show of error," *Graver Manufacturing Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949), "a question whether the evidence was sufficient to support the jury verdict for the plaintiff stands little or no chance of being granted," *Supreme Court Practice, supra,* at 220. A contrary rule would serve "not only to disregard the Court's proper function, but to deflect the Court's energies from the mass of important and difficult business properly here." *Sentilles* v. *Inter-Caribbean Corp.*, 361 U.S. 107, 111 (1959) (Stewart, J., concurring). Petitioners, Pet., at 13, rely solely on *Schultz* v. *Pennsylvania R.R. Co.*, 350 U.S. 523 (1956), to support their

"jury infringement" argument, but *Schultz* itself is a pre-1969 Jones Act case which raised a sufficiency-of-the-evidence claim that the Court no longer accepts for review. *Supreme Court Practice, supra,* at 219-20.

Petitioners' jury infringement argument rests on a philosophical disagreement with having a court, rather than a jury, decide whether the elements of their contract and tort claims were sufficiently made out to go to the jury. But it is the duty of courts, utilizing procedures such as summary judgment, directed verdict and judgment notwithstanding the verdict, to separate legally sufficient and legitimate claims from illegitimate claims that, whatever their emotional appeal, are not allowed in law. Hyperbole aside, the Ninth Circuit's review and reversal of the judgment on petitioners' state law claims not only was constitutionally regular, but was procedurally routine. *See, e.g., Neely* v. *Martin K. Eby Construction Co.*, 386 U.S. 298 (1967) (court of appeals properly reversed denial of judgment notwithstanding the verdict where essential elements of plaintiff's tort claims were not proved; granting judgment notwithstanding the verdict does not violate the constitutional guaranty of a jury trial).

In their attempt to convert their sufficiency-of-the-evidence claim into a "jury infringement" issue that would, even if the conversion could be made, not warrant this Court's review, petitioners identify two categories of evidence they say the majority misconstrued or overlooked: (1) evidence of Hilton's "post termination" conduct in "deliberately convey[ing] the message, from about 1984 until the jury verdict in 1989, that petitioners were responsible for huge losses—all the time knowing that the problems at the Hilton operations had nothing to do with petitioners," Pet., at 11; and (2) evidence relating to petitioners' express and implied contract claims, *id.*, at 12. Neither category supports their cause, much less their plea for this Court to second-guess the court below.[19]

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[19] Petitioners also complain that the majority, in reviewing the record,

Petitioners posit the so-called post-termination evidence as sufficient, "by itself," to support judgment on their intentional infliction claims. Pet., at 11. Petitioners' position contradicts their admission below—that they did *not* base their intentional infliction claims on Hilton's statement to the press or its compelled testimony in deposition and at trial about the low PC—which comprised the only evidence of post-termination "acts" by Hilton that petitioners were able to present. *See* note 6, *supra*. It is, moreover, established in Nevada (as in most States) that claims for intentional infliction of emotional distress cannot be predicated on an employer's statements, in an administrative or judicial hearing on a contested termination, about the reasons for the firing. *Id.*; *see Knox* v. *Dick*, 665 P.2d 267 (Nev. 1983). Under these circumstances, it would have been error to consider the post-termination evidence, not the reverse.

Respecting their implied contract claims, petitioners recite a laundry list of the items of evidence they say the majority "ignored or rejected," thereby invading "the fact-finding function of the jury." Pet., at 12-13. Items (1), (3), (4), (7) and (8) of petitioners' eight-item list correspond almost exactly to items (1), (3), (4), (4) and (2), respectively, as articulated by the majority in its summary of petitioners' proof of an implied contract, reprinted *supra*, at 3, Pet. App., at 6-7, 959 F.2d, at 759-60. While not set out by the majority in list form, the other items on petitioners' laundry list—items (2), (5) and (6)—were specifically addressed by the majority as well. Pet. App., at 8 n.1, 14-15 & 18-19, 959 F.2d, at 960 n.1, 963 & 964 n.5. None of the items in petitioners' laundry list thus can be said to have been "ignored" or "rejected" by the majority.

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displayed a "casual attitude toward the petitioners as individuals . . . ." Pet., at 10. Even if petitioners' complaint had some legal or factual basis—which it does not, petitioners fail to acknowledge that, at their insistence, the "jury was charged to consider the [implied] contract [of employment] issue as to the plaintiffs collectively." Pet. App., at 18, 959 F.2d, at 764. Petitioners thus chose at trial to stand or fall together, a choice they were not free to repudiate in the Ninth Circuit, nor in this Court.

The majority did, however, reject *as legally insufficient* to overcome the at-will presumption the *types* of evidence identified in petitioners' laundry list. Its decision comports fully with the Nevada cases cited in part I. above and with the Ninth Circuit's kindred decision in *Smoot* v. *Boise Cascade Corp.*, 942 F.2d 1408 (9th Cir. 1992), as the majority's meticulous comparison of the facts presented here and in those authorities shows. Petitioners' true disagreement is not with the majority's depiction of the record facts—which is demonstrably faithful to the evidence—but with its refusal to imbue those facts with the legal significance petitioners see in them. This is not a question of fact, for the jury to decide, but one of state law, for the court of appeals.[20] Question 2 is not worthy of this Court's review.

2. There Is No Legitimate *Erie* Issue in the Ninth Circuit's Interpretation and Application of Nevada Law

Question 3 assails what petitioners describe as "the Court of Appeals [sic] misconstrual of state law." Pet., at 16. Petitioners mount two separate attacks, one on the intentional infliction claims, the other on the at-will presumption. First, they contend the court below erred in treating their at-will status as a disqualifying precondition instead of a surmountable defense to their intentional infliction claims. Pet., at 14. Second, they say the Ninth Circuit "confused" Nevada law governing implied contracts of continued employment by analyzing the claimed contracts according to the individual factors asserted to give rise to them instead of treating the factors collectively. Pet., at 15-16. What the majority has done, petitioners

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[20] *Compare* Fed. R. Evid. 302 ("the effect of a presumption respecting a fact which is an element of a claim or defense as to which State law supplies the rule of decision is determined in accordance with State law") *with* 9 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 2254 p. 541 (West 1971) ("[w]hether the evidence is sufficient to create an issue of fact for the jury is solely a question of law to be determined by the court") (footnote omitted) and cases discussed in part II.A.1., *supra* (this Court defers to the courts of appeals in matters of state law).

inveigh, is to "put [Hilton's] outrageous abuse of its relationship with petitioners beyond the reach of law . . . [with] absolutely no indication in state decisions that such conduct is to be protected." Pet., at 16.

It is petitioners who are confused. Hilton's post-termination conduct has no proper place in petitioners' intentional infliction claims by reason, first, of petitioners' explicit concession on that point and, second, as a matter of state and First Amendment law. *See* note 6, *supra*. This leaves the terminations themselves as the "act" claimed to give rise to liability in tort. The majority's decision that the act of terminating an at-will employee does not constitute a tort conforms to Nevada law under *Alford* v. *Harold's Club*.[21]

Nor did the majority depart from or otherwise misinterpret the law applicable to petitioners' at-will status. As the majority opinion demonstrates—and petitioners largely conceded below—the Nevada Supreme Court's decisions in *Bally's Grand*, *Vancheri*, *Valgardson* and *Śmith v. Cladianos*, "hold that any one of [the items comprising petitioners' laundry list of at will evidence] alone . . . is insufficient to defeat the at will presumption, and that vague, general statements of good will [are] insufficient to give rise to enforceable contract rights." Petrs. Op. Br., at 18. Petitioners nonetheless present to the Court as collectively sufficient the very factors they conceded

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[21] Petitioners, without the support of Judge Boochever in dissent, try to circumvent the holding of *Alford* by suggesting, Pet., at 14, that the Nevada Supreme Court in *Alford* misunderstood and misapplied "a line of authorities," including Restatement 2d Torts and two of its own decisions, upon which *Alford* assertedly "was itself based." Aside from the fact that the *Alford* decision makes no reference whatsoever to those "lines of authorities," petitioners, who purport to be the champions of federalism, argue in effect that in *Alford*, which squarely held that the intentional infliction tort would not lie absent an independent legal wrong, the Nevada Supreme Court got the law wrong. In so twisting principles of federalism (as they do throughout the petition) to suit their ends, petitioners do not tell the Court that *no* State recognizes a common law right of an at-will employee to recover for intentional infliction of emotional distress arising out of a discharge.

below were individually insufficient under Nevada law to overcome the at-will presumption, Pet., at 15.

The factors petitioners contend to be collectively sufficient bear on their *implied* and not their *express* contract claims. *See* Pet., at 12-13. The Nevada cases they cite to support their claim that the contract issue "is one of fact to be determined by the jury on the basis of *all* of the evidence," Pet., at 15 (emphasis in original), however, are all *express* contract cases.[22] It is one thing to state that evidence of specific oral promises made at the time an express contract was allegedly formed should be considered, and quite another to conclude that an enforceable "implied" contract can inhere in conduct already held, as a matter of law, to be without promissory content or legal significance.

As the majority correctly held, an implied

> contract is, after all, a legal relationship which requires a meeting of the minds between the contracting parties. Individual factors that do not, as a matter of law, establish such a meeting of the minds cannot, by some peculiar alchemy, create a legally binding relationship when combined with each other.

Pet. App., at 9 n.3, 959 F.2d, at 761 n.3. This ruling is unexceptionable. It states as law the results reached in *Vancheri*, *Valgardson*, and *Bally's Grand*, where the Ne-

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[22] In *Stone* v. *Mission Bay Mortgage Co.*, 672 P.2d, at 629, on which petitioners principally rely, the case was remanded for trial based on the employee's sworn statement that she and her employer entered into an *express* "oral contract of employment for 'no less than one year' . . . prior to her beginning work . . . she [understood] would only be terminated if her work was found to be unsatisfactory." The employee in *Beales* v. *Hillhaven, Inc.*, 825 P.2d, at 216, testified she was "hired, pursuant to a [written] employee handbook" that, unlike the Hilton handbooks here, *expressly* stated, 'the days of termination 'at will' or 'at whim' are gone.' " The employees in *D'Angelo* likewise presented evidence of express contractual promises, not simply conduct from which they sought to have such promises implied.

vada Supreme Court rejected multiple items claimed to prove an implied contract as individually *and collectively* insufficient to overcome the at-will presumption. It also is in harmony with Nevada's traditional implied contract law generally.[23]

The Ninth Circuit, in short, correctly determined and applied state law.[24] But there is another, even more fundamental reason to reject Question 3 as a basis for the exercise of certiorari jurisdiction in this case. As previously noted, the "Court does not . . . grant certiorari to correct errors of state law." Pet., at 16. Indeed, in 1980 the Court specifically modified what is now its Rule 10 governing exercise of its certiorari jurisdiction to eliminate cases in which a federal court of appeals was said to have resolved "an important state [law] . . . question in a way in conflict with applicable state . . . law." *See Supreme Court Practice*, *supra*, at 194-95. The task of deciphering, predicting, and applying state law belongs to the courts of appeals and the district courts, not this Court. As exemplified by

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[23] *See Warrington*, 590 P.2d, at 1164 ("while custom and usage may be used to establish the terms of a contract, it cannot create one where none existed"; nor can a promise be implied from an informal act of courtesy without recognized promissory significance); *Smith* v. *Recrion Corp.*, 541 P.2d, at 665 (an implied contract, equally with an express contract, requires an "ascertainable agreement," conduct or words expressive of the terms of the contract and an intent to be legally bound).

[24] Nor is there any merit to petitioners' alternative argument that, even if the majority correctly analyzed the law applicable to their initial agreement with Hilton, it disregarded the later modification that agreement under went. Pet., at 12. The evidence petitioners presented consisted almost entirely of corporate "pep talks" following times of turmoil, such as the weeks following the Las Vegas Hilton fire in which eight people lost their lives. Such vague statements do not, as a matter of law, convert at-will contracts to contracts terminable only for just cause, *Smoot* v. *Boise Cascade Corp.*, *supra*; they are insufficiently definite. Indeed, so easy is it to allege a subsequent modification of a contract whose performance is already underway that Nevada requires proof of the fact and terms of such a modification to be by clear and convincing evidence, *Clark County Sports Enterprises, Inc.* v. *Las Vegas*, 606 P.2d 171 (Nev. 1980), a standard not even petitioners contend was satisfied here.

the 1980 amendments to Rule 10, this Court has a "settled and firm policy of deferring to regional courts of appeals in matters that involve construction of state law." *Bowen* v. *Massachusetts*, 487 U.S. 879, 908 (1988). No cause exists to depart from that firm practice here.

C. Petitioners' Untimely Challenge to Judge Kozinski's Qualifications Is Frivolous

Petitioners filed their motion to recuse Judge Kozinski on June 1, 1991, two months after the April 2 oral argument. Their motion asserted a disqualifying "appearance of partiality" in the remarks by and about Judge Kozinski in a *California Lawyer* article and the reassignment of the case to a panel that included Judge Kozinski after the original February 5 argument date was vacated on motion of the EEOC.[25] Petitioners supported their motion with: (1) a copy of the *California Lawyer* cover and article (which was mailed to all members of the California Bar, of which petitioners' lead counsel is a member, on March 1, 1991, a full month before argument); (2) identical affidavits from each petitioner, stating he had read the *California Lawyer* article and swearing that, based on it, "I question [Judge Kozinski's] impartiality in a case such as ours and am concerned that I will not receive a fair hearing before Judge Kozinski"; and (3) an affidavit of petitioners' lead counsel, stating that he mailed the *California Lawyer* article to his clients after oral argument but *not* stating when that article first came to his attention.

Judge Kozinski did not deny the motion to recuse, as petitioners assert, Pet., at 16; Judges Boochever and O'Scannlain did, without Judge Kozinski's participation.[26]

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[25] Continuance was requested due to the hospitalization of the EEOC's counsel. The EEOC asked petitioners to consent to the continuance on January 25, the Friday before the identity of the February 5 panel would be revealed, and they refused. On Monday—after the identity of the February panel (Judges Beezer, Kozinski and Rymer) was revealed—petitioners reversed their position and joined the EEOC in requesting a continuance of the argument.

[26] Petitioners unsuccessfully sought rehearing and rehearing *en banc* of the order denying recusal shortly after that order was entered.

As a threshold matter, the motion was procedurally improper because untimely filed with no explanation, much less "good cause," offered to excuse the delay. *See United States* v. *Branco*, 798 F.2d 1302, 1304-05 (9th Cir. 1986) (citing cases). The identity of the April 2 panel was made public on March 25, yet petitioners waited until June 1 to file their motion. They thus failed to assert disqualification "at the earliest possible moment after obtaining knowledge of facts demonstrating the basis for such a claim," as is required; instead, they proceeded to argument, thus "participat[ing] in a substantial manner" in the proceeding and ensuring that the motion could not thereafter be granted without a significant "waste of judicial resources." *Apple* v. *Jewish Hospital & Medical Center*, 829 F.2d 326, 333-34 (2d Cir. 1987) (*citing Branco*, *supra*, and *United States* v. *Studley*, 783 F.2d 934 (9th Cir. 1986)). Neither in the Ninth Circuit nor elsewhere is a litigant entitled to "sample the temper of the court"[27] before deciding whether to seek recusal. The untimeliness of petitioners' recusal challenge, without more, sustains the summary order entered by Judges Boochever and O'Scannlain denying petitioners' motion to recuse Judge Kozinski.

But there is more: The motion is substantively frivolous.[28] Petitioners have reproduced the *California Lawyer*

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[27] *United States* v. *Conforte*, 457 F. Supp. 641, 654 n.7 (D. Nev. 1978), *aff'd in pertinent part*, 624 F.2d 869, 879-82 (9th Cir.), *cert. denied*, 499 U.S. 1012 (1980).

[28] Petitioners' attack on Judge Kozinski's qualifications is typical of petitions that bring ill-founded disqualification issues to this Court in last-ditch attempts to secure reversal of judgments. *Sturman* v. *United States*, No. 91-1376, *cert. denied*, 112 S. Ct. 2964 (1992); *Church of Scientology International* v. *United States District Court*, No. 91-1376, *cert. denied*, 112 S. Ct. 2273 (1992); *Krain* v. *Nadler*, No. 91-1579, *cert. denied*, 112 S. Ct. 1953 (1992) (*pro se*); *Stephens* v. *McKinney*, No. 91-931, *cert. denied*, 112 S. Ct. 1167 (1992) (*pro se*); *Alexander* v. *Los Angeles County*, No. 91-624, *cert. denied*, 112 S. Ct. 637 (1991) (*pro se*); *Hanft* v. *Camar Realty Corp.*, No. 91-421, *cert. denied*, 112 S. Ct. 376 (1991) (*pro se*); *Polyak* v. *Boston*, No. 90-1797, *cert. denied*, 112 S. Ct. 63 (1991) (*pro se*); *Moeller* v. *United States*, No. 90-216, *cert.* denied, 111 S. Ct. 151 (1990) (*pro se*).

article in the appendix to their petition. It consists of excerpts of judicial opinions authored by Judge Kozinski; statements by others about Judge Kozinski, mostly laudatory but some not; and a single statement—"I'm still a tough boss"—attributed to him in the context of his then-current ruminations on his tenure at the Merit Systems Protection Board in the early 1980s.

The disqualification statute upon which petitioners rely, 28 U.S.C. § 455(a), "summons a disqualification not merely when the judge's impartiality might somehow be questioned, but only when it may *reasonably* be questioned." *United States* v. *Haldeman*, 559 F.2d 31, 133 n.297 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977) (emphasis in original). The test is objective and not influenced by the "subjective feelings or 'beliefs' of the movants." *McCann* v. *Communications Design Corp.*, 775 F. Supp. 1506, 1524 (D. Conn. 1991); *State of Idaho* v. *Freeman*, 507 F. Supp. 706, 733 (D. Idaho 1981).

Judge Kozinski's "prior judicial determinations and inferences drawn therefrom," as excerpted and discussed in the *California Lawyer*, "are not grounds for recusal." *United States* v. *Mitchell*, 377 F. Supp. 1312, 1318 (D.D.C. 1974); *United States* v. *Conforte*, 624 F.2d, at 882 ("[a] judge's views on legal issues may not serve as the basis for motions to disqualify"). Statements by others to the press about a judge likewise are irrelevant. *In re United States*, 666 F.2d 690, 695 (1st Cir. 1981); *Hodgson* v. *Liquor Salesman's Union Local No. 2*, 444 F.2d 1344, 1349 (2d Cir. 1971) ("If mere rumor, gossip or general conclusory opinions were sufficient [to warrant recusal,] any party could reject any judge at will.") And if Judge Kozinski's statement about still being a "tough boss" disqualified him from all employment cases, it is difficult to imagine how many sitting federal judges would not be similarly disqualified in broad classes of cases routinely litigated in the federal courts. Judges do not lose their humanity upon appointment to the bench. *In re J. P. Linahan*, 138 F.2d 650, 651-54 (2d Cir. 1938) (if "bias" and "impartiality" are "defined to mean the total absence of preconceptions

in the mind of the judge, then no one has ever had a fair trial and no one ever will"); *see Phillips* v. *Joint Legislative Committee on Performance & Expenditure Review*, 637 F.2d 1014, 1020-21 (5th Cir. 1981), *cert. denied sub nom. Mississippi* v. *Phillips*, 456 U.S. 960 (1982) (allegations that, if accepted, would have disqualified judge from entire class of cases do not state legitimate basis for recusal and arguably impinge the constitutional safeguards that prohibit a judge's removal from office save by impeachment).

Petitioners' argument about the panel reassignment is equally frivolous. Litigants have no vested rights in the procedures whereby cases are assigned. *United States* v. *Torbert*, 496 F.2d 154, 157 (9th Cir.), *cert. denied*, 419 U.S. 857 (1974). Judge Kozinski's assignment to the February panel was by lot. Consistent with petitioners' repeated insistence that Hilton's appeal be expedited to the extent possible, the Clerk apparently reassigned the case for argument at the court's next sitting, consistent with giving all members of the new panel sufficient time to prepare for argument. The happenstance of the hospitalization of the EEOC's counsel and the continuance of the first argument after the identity of the February panel was revealed did not give petitioners "a negative veto," *In re United States*, 666 F.2d, at 694, over Judge Kozinski's participation in this case. Yet, that is what petitioners' panel reassignment argument, if accepted would require this Court to hold. "Litigants ought not have to face a judge where there is a reasonable question of impartiality, *but they are not entitled to judges of their own choice.*" H.R. Rep. No. 1453, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code, Cong. & Admin. News 6355 (emphasis added).

"[T]he Court of Appeals is in a better position to evaluate the significance [of a claimed violation of section 455] than is this Court." *Liljeberg* v. *Health Services Acquisition Corp.*, 486 U.S. 847, 862 (1988). The summary rejection by Judges Boochever and O'Scannlain of petitioners' untimely and frivolous disqualification challenge was correct and does not warrant the attention of this Court.

III. CONCLUSION

This case raises no important issue of federal law, let alone one upon which there is any identified disagreement among the courts of appeals. Review should be denied.

September 9, 1992

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Case Nos. 90-15424, 90-15460, 90-15623

JOHN L. BROOKS, et al.,
Plaintiffs/Appellees/
Cross-Appellants,

and

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Intervenor/
Appellee/Cross-Appellant

v.

HILTON CASINOS, INC., et al.,
Defendants/Appellants/
Cross-Appellees.

Appeal From The
United States District Court For
The District Of Nevada

BRIEF OF APPELLEES/CROSS-APPELLANTS

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[42]

c. Certification of Issues to the Nevada Supreme Court is Unwarranted.

Hilton argues that, if plaintiffs, emotional distress claim is upheld, the issue of whether it is preempted by the Nevada Industrial Insurance Act, (hereafter "NIIA") Nev. Rev. Stats. § 616.370, should be certified to the Nevada Supreme Court.

The District Court held that plaintiffs' claim would not be preempted by the NIIA. The Court did not exceed its authority in making this determination as to the law of the state. See *King v. Penrod Drilling Co.*, 652 F.Supp. 1331, 1333 (D. Nev. 1987), citing *Dimidowich v. Bell and Howell*, 803 F.2d 1473, 1482 (9th Circuit, 1986). Judge Foley's ruling in this case is consistent with that of another District Court, sitting in Nevada, which held that, although a negligence action would be preempted by the NIIA, intentional tortious conduct is not preempted. See *King v. Penrod Drilling Co.*, supra, at 1333; see also *Wolber v. Service Corp. Int'l*, 612 F.Supp. 235 (D.Nev. 1985).

This is not an issue of such critical and fundamental importance that the District Court could not reasonably exercise its judgment on the applicable law. It is not a new and novel [43] issue. It has been addressed by many courts. The District Court had substantial relevant authority, from Nevada and elsewhere, to rely upon for guidance.[61] Thus certification of this or any other issue is unwarranted.

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[61] The same is true with respect to recognition of an intentional infliction of emotional distress claim in the employment context which Hilton argues (at p. 40 of its brief) should also be certified to the Nevada Supreme Court. See discussion, supra, § C.2.a.